88-1937

NO.

Supreme Court, U.S.
FILED
MAY 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1988

EDWARD G. JONES

Petitioner,

V.

THE CELOTEX CORPORATION and
AETNA CASUALTY & SURETY COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Respectfully submitted,
FORD T. HARDY, JR.
416 Gravier Street
New Orleans, La. 70130
(504) 561-0514

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit erred in dismissing petitioner's appeal for alleged lack of jurisdiction.

2. Whether petitioner's notice of appeal filed on July 16, 1987, two days **after** the district court's judgment notwithstanding the verdict was entered on July 14, 1987, constitutes a valid appeal from a final judgment under Acosta v. Louisiana Department of Health and Human Resources, 478 U.S. 251, 106 S. Ct. 2876, 92 L. Ed. 2d 192 (1986).

3. Whether the Fifth Circuit has failed to follow the mandate of the United States Supreme Court in numerous decisions such as Cohen, Gillespie, Banker's Trust, Foman and Acosta, infra, that practical and not technical construction of the principles of finality of judgments should govern to

prevent loss of the right to appeal, **not to facilitate** loss of the right to appeal.

4. Whether the order of the district court, entered on August 10, 1987, approximately three weeks after petitioner filed a notice of appeal, granting petitioner a pauper appeal, further certifying that petitioner's appeal was not frivolous and presented a substantial question, verifies that petitioner's appeal of July 16, 1987 was from a final judgment.

LIST OF PARTIES

Petitioner - Edward G. Jones - original plaintiff/appellant;

Respondents - The Celotex Corporation, a wholy owned subsidiary of the Jim Walter Corporation, and Aetna Casualty and Surety Company - original defendants/appellees;

Intervenor - Liberty Mutual Insurance Company - original intervenor/co-appellant

TABLE OF CONTENTS

Page

Questions Presented for Review . . . i

List of Parties. iii

Table of Contents. iv

Table of Authorities vii

Petition for Writ of Certiorari. . . 1

Relevant Opinions and Orders 6

Statutory Provisions 10

Jurisdiction 10

Statement of Proceedings and Dispositions 11

Argument and Authorities 15

Conflict in 5th Circuit. 30

Alternative Argument Regarding Motion for Leave to Secure Correction of Judgment from District Court 35

Conclusion 38

Appendix A-1

A. Minute Entry of July 8, 1987 entered on July 14, 1987. . . A-1

B. District Court Docket Sheet Excerpts. A-2

C. Petitioner's Notice of Appeal filed July 16, 1987 . . . . . A-3

D. Petitioner's Ex Parte Motion for Pauper Appeal filed July 26, 1987. . . . . A-5

E. Letter from the Clerk of the United States Court of Appeals, Fifth Circuit dated October 19, 1987. . . . . A-8

F. Judgment of District Court dated April 8, 1987, entered April 9, 1987. . . . . .A-10

G. Judgment of District Court dated October 30, 1987, entered November 2, 1987. . . . . .A-12

H. Opinion of the Fifth Circuit dated March 7, 1989 . . . . . .A-14

I. Opinion of the Fifth Circuit dated October 14, 1988. . . .A-18

STATUTES. A-28

J. Federal Rule of Appellate Procedure 4 . . . . . .A-28

K. Federal Rule of Civil Procedure 54. . . . . .A-34

L. Federal Rule of Civil Procedure 58. . . . . .A-37

M. Federal Rule of Civil Procedure 60. . . . . .A-39

N. Federal Rule of Civil Procedure 79. . . . . .A-43

O. 28 USC 1291 . . . . . .A-47

P. 28 USC 2101 . . . . . .A-48

TABLE OF AUTHORITIES

CASES: **Page**

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).....15

Gillespie v. United States Steel Corporation, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964).....16

Brown Shoe Company v. United States, 370 U.S. 294, 306, 82 S. Ct. 1502, 1513, 8 L. Ed. 2d 510 (1962).....17

Bronson v. La Crosse & M. Railroad Company, 2 Black 524, 531, 17 L. Ed. 347, 359.....17

Forgay v. Conrad, 6 How. 201, 203, 12 L. Ed. 404.....17

Dickerson v. Petroleum Conversion Corp., 338 U.S. 507, 511, 70 S. Ct. 322, 324, 94 L. Ed. 299 (1950).....17

Jetco Electronic Industries, Inc. v. Gardiner, 473 F. 2d 1228 (5th Cir., 1973).....17

Associated Press v. Taft-Ingalls Corporation, 323 F. 2d 114 (6th Cir., 1963).....21

Securities & Exchange Commission v. Jean R. Veditz Company, 22 F.R.D. 479, 482 (S.D.N.Y., 1958).....21

Banker's Trust Company v. Mallis, 435 U.S. 381, 98 S. Ct. 1117 (1978)....22

Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).....24

Acosta v. Louisiana Department of Health & Human Resources, 478 U.S. 251, 106 S. Ct. 2876 92 L. Ed. 2d 192 (1986).....24

Beaudry Motor Company v. Abco Properties, Inc., 780 F. 2d 751 (9th Cir.,1986).....25

U.S. v. Price, 688 F. 2d 204 (3rd Cir., 1982).....26

Williams v. Town of Okoboji, 599 F. 2d 238 (8th Cir., 1979).....26

Yaretsky v. Blum, 592 F. 2d 65 (2nd Cir., 1979).....27

Bates v. Batte, 187 F. 2d 142 (5th Cir., 1951) cert. denied, 342 U.S. 815, 72 S. Ct. 29, 96 L. Ed. 616 (1951).....27

Woods v. Nicholas, 163 F. 2d 615 (10th Cir., 1947).....27

Erstling v. Southern Bell T & T Co., 255 F. 2d 93 (5th Cir., 1958).....27

Kirtland v. J. Ray McDermott & Co., 568 F. 2d 1166 (5th Cir., 1978).....27

Markham v. Holt, 369 F. 2d 940 (5th Cir., 1966).....28

Stokes v. Peyton's Inc., 508 F. 2d 1287 (5th Cir., 1975).....28

Budinich v. Becton Dickinson & Co., ____ U.S. ___, 108 S. Ct. 1717, 100 L. Ed. 178 (1988).....28

Nagle v. Lee, 807 F. 2d 435 (5th Cir., 1987).....31

U.S. v. Indrelunas, 411 U.S. 216, 93 S. Ct. 1562, 36 L. Ed. 2d 202 (1973).....32

Hanson v. Town of Flower Mound, 679 F. 2d 497 (5th Cir., 1982).....32

Sassoon v. U.S., 549 F. 2d 983 (5th Cir., 1977).....34

STATUTES: (Appendix J-O)

Federal Rule of Appellate Procedure 4

Federal Rule of Civil Procedure 54

Federal Rule of Civil Procedure 58

Federal Rule of Civil Procedure 60(a)

Federal Rule of Civil Procedure 79(a)

28 USC 1291

28 USC 2101

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO.

EDWARD G. JONES

PETITIONER,

v.

THE CELOTEX CORPORATION and
AETNA CASUALTY & SURETY COMPANY

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully requests that a writ of certiorari issue herein to review the opinions of the United States Court of Appeals for the Fifth Circuit. Those opinions concluded, inter alia, that because no notice of appeal was filed after a second but effectively identical judgment notwithstanding the verdict was entered, that the Fifth Circuit was

without jurisdiction. The appeals court failed to accept jurisdiction over petitioner's appeal filed two days after the first judgment notwithstanding a $670,000.00 jury verdict was entered by the clerk on July 14, 1987, holding that this entry did not constitute a final decision.

At no time did respondent, Celotex Corporation and Aetna Casualty & Surety Company, raise any objection to the petitioner's failure to in effect file a second notice of appeal after the district court rendered written reasons for its judgment notwithstanding the verdict, which had been previously entered by the Clerk on July 14, 1987.

The Fifth Circuit totally failed to give any credence whatsoever to the fact that the district court signed an order, approximately three weeks after

petitioner filed his notice of appeal on July 16, 1987, granting petitioner a pauper appeal, certifying in the pauper order that the appeal was not frivolous and presented a substantial question of law for the Fifth Circuit to consider. This pauper order and certification of the fact that the appeal was not frivolous and presented a substantial question of law was signed by the district court on August 6, 1987, and entered into the district court's docket on August 10, 1987.

Since a second notice of appeal was not filed after November 2, 1987, when a more formal judgment was entered by the clerk, the Fifth Circuit dismissed petitioner's appeal for lack of jurisdiction. The judgment of November 2, 1987, merely recites that the court having granted the motion for judgment

notwithstanding the verdict of Celotex and Aetna, therefore enters judgment in those parties' favor dismissing the complaint of the petitioner.

A mere review of exhibits A and G indicates that both documents effectively notify all counsel that the district court has granted the motion for judgment notwithstanding the verdict of Celotex and Aetna and that this judgment has been entered on July 16, 1987. Petitioner therefore properly appealed on July 16, 1987, and sought an order from the district court for a pauper order, which was entered on August 10, 1987 as the district court certified that the appeal was not frivolous but presented a substantial question.

When the court later entered judgment on November 2, 1987, petitioner

was already on appeal to the Fifth Circuit for the very same appeal of the judgment notwithstanding the verdict. Therefore, by the district court's own order, the appeal had been certified to be not frivolous and presenting a substantial question, and the Fifth Circuit had in effect accepted the appeal, corresponding to the district court for production of the record (appendix E).

The Fifth Circuit has therefore dismissed this appeal on the most technical of technicalities. In fact, the issue of the Fifth Circuit's jurisdiction was never raised by any party until oral argument on the merits conducted on August 2, 1988 in the Fifth Circuit. At no time did Celotex and Aetna ever complain of the Fifth Circuit not having jurisdiction.

Petitioner timely filed a petition or rehearing and a suggestion for rehearing en banc, which were denied by the Fifth Circuit Court of Appeals on March 7, 1989. It is therefore necessary for this court to issue a writ of certiorari, instructing the Fifth Circuit to accept jurisdiction of this case. Justice demands that petitioner be granted a hearing on the merits of the district court's judgment notwithstanding a $670,000.00 jury verdict, which now is a balance of well over one million dollars with interest as this suit was filed on February 1, 1985, over four years ago.

RELEVANT OPINIONS AND ORDERS BELOW

A) Excerpts of minute entry of July 8, 1987, received by counsel for petitioner as a **separate document,**

indicating that the motion of Celotex Corporation and Aetna Casualty & Surety Company for judgment notwithstanding the verdict or in the alternative for new trial was argued on July 8, 1987 and that the motion for judgment notwithstanding the verdict was granted on July 8, 1987 and entered on the docket sheet of the district court on July 14, 1987.

B) Excerpts from District Court docket sheet of July 8, 1987, indicating that a hearing was held on a motion by Celotex Corporation and Aetna for judgment notwithstanding the verdict or in the alternative for new trial and that the motion for judgment notwithstanding the verdict was granted and docketed on July 14, 1987.

C) Petitioner's notice of appeal filed on July 14, 1987 indicating that petitioner intended to appeal the judgment entered on July 14, 1987, that being the granting of judgment notwithstanding the verdict in favor of Celotex and Aetna.

D) Petitioner's ex parte motion for pauper appeal filed on July 26, 1987, with the order of the district court granting petitioner a pauper appeal further certifying that the appeal is not frivolous and presents a substantial question, said order dated August 6, 1987, and entered on August 10, 1987.

E) Letter from the clerk of the United States Court of Appeals, Fifth Circuit to the clerk of the United States District Court for the Eastern District of Louisiana

advising that the sixty (60) day discount period expired and that the court reporter would be required to discount her invoice by ten (10%) percent through November 3, 1987, and thereafter a twenty (20%) percent discount must be made.

F) Judgment of the district court approved by the presiding Judge dated April 8, 1987.

G) Judgment of thc district court approved by the presiding judge dated October 30, 1987.

H) Opinion of the Fifth Circuit dismissing petitioner's appeal dated October 14, 1988. Jones v. Celotex Corp. 857 F. 2d 273 (5th Cir., 1988).

I) Opinion of the Fifth Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc

dated March 7, 1989. Jones v. Celotex Corp. ____ F. 2d 2434 (5th Cir., 1989).

STATUTORY PROVISIONS - SEE APPENDIX

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit dismissing petitioner's appeal was entered on October 14, 1988. (appendix H). The Fifth Circuit later denied petitioner's petition for rehearing and suggestion for rehearing en banc by entry date of March 7, 1989. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 USC Section 1254(1). This writ of certiorari is timely under 28 USC 2101(c), if filed within ninety days of the denial of the petition for rehearing and/or suggestion for rehearing en banc, on or before June 5, 1989.

STATEMENT OF PROCEEDINGS AND DISPOSITION

Petitioner, Edward G. Jones, filed a damage suit based on diversity of citizenship under 28 USC 1333 on February 1, 1985. Jones obtained a $670,000.00 jury verdict on April 2, 1987, and a final judgment reflecting that verdict was approved by the court on April 8, 1987 and entered on April 9, 1987. Appellees filed a motion for judgment notwithstanding the verdict which the District Judge orally granted the motion **in open court** on July 8, 1987. The district court clearly ruled in the presence and clear understanding of counsel for all parties in open court in favor of Celotex and Aetna. An order reflecting the oral ruling was entered on July 14, 1987.

Petitioner received a **separate document** indicating that the motion was

argued on July 8, 1987, and that judgment notwithstanding the verdict was granted and entered on July 14, 1987. Jones thereafter filed a notice of appeal on July 16, 1987.

On August 6, 1987, the district court signed an order granting Jones a pauper appeal which certified that the appeal was not frivolous and presented a substantial question. At no time did the District Judge indicate its intention to issue another judgment and by signing the order of August 6, 1987, it certified that the appeal was not premature, as the District Judge gave petitioner Jones pauper standing further certifying that the appeal was not frivolous and presented a substantial question.

Approximately two months later, the clerk of the 5th Circuit wrote the clerk

of the district court advising that the record and trial transcript had not been received and that the court reporter would be required to discount her invoice by ten (10%) percent. After the transcript was finally completed, the district court unexpectedly issued written reasons for its previous judgment of July 8, 1987 and a second judgment form was approved by the district court after preparation by the clerk. That judgment states:

> The Court having granted defendant's motion for judgment notwithstanding the verdict, accordingly; (emphasis supplied)

Said judgment obviously refers to the previous judgment of July 8, 1987, which was entered on July 14, 1987, as this later judgment is dated October 30, 1987, and entered on November 2, 1987, almost four months after the court

orally advised the parties in open court that it would grant a judgment notwithstanding the verdict.

The 5th Circuit Court of Appeals, in a per curiam opinion, dismissed Jones' appeal, on October 14, 1988, after the parties had fully briefed and orally argued the merits of the case, for the reason that "the minute entry of the clerk dated July 14, 1987, did not constitute a final decision". Jones has filed a petition for panel rehearing and a suggestion for rehearing en banc, which both have been denied, and now brings this petition for writ of certiorari to the United States Supreme Court as the lower courts have inequitably deprived petitioner of his right to appeal the summary reversal of a jury verdict in his favor now worth in excess of one million dollars.

ARGUMENT AND AUTHORITIES

The United States Supreme Court has held that practical and not technical considerations are to govern the rules concerning the jurisdiction of the appellate courts under the basic principle that appeals are to be encouraged in a free, democratic society. In Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) the Supreme Court addressed the applicability of 28 U.S.C. 1291. The Court defined the purpose of the statute as to "disallow appeal from any decision which is tentative, informal or incomplete, as appeal gives the upper court a power of review, not one of intervention." supra, 69 S.Ct. 1225.

The Supreme Court further defined the meaning of a "final decision" in

Gillespie v. United States Steel Corporation, 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed. 2d 199 (1964), which construed the meaning of a final judgment or order under 28 U.S.C. 1291. The court held:

> Under 28 U.S.C. 1291 an appeal may be taken from any 'final' order of a District Court. But as this court often has pointed out, a final decision does not necessarily mean the last order possible to be made in a case. Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 545, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528. And our cases long have recognized that whether a ruling is 'final' within the meaning of Section 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' Cohen v. Beneficial Industrial Loan Corporation, supra, 337 U.S. at 546, 69 S.Ct., at 1226. See

> also Brown Shoe Company v. United States, 370 U.S. 294, 306, 82 S.Ct. 1502, 1513, 8 L.Ed. 2d 510 (1962); Bronson v. La Crosse & M. Railroad Company, 2 Black 524, 531, 17 L. Ed. 347, 359; Forgay v. Conrad, 6 How. 201, 203, 12 L.Ed. 404; Dickerson v. Petroleum Conversion Corp., 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950), pointed out that in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other'. Gillespie, supra, p. 311.

The Fifth Circuit adopted the Supreme Court rationale of "practical rather than technical" construction in Jetco Electronic Industries, Inc. v. Gardiner, 473 F. 2d 1228 (5th Cir., 1973), and stated that the issue is one of "substance over form" in its decision to follow the Supreme Court's command that practical, not technical considerations are to govern the

application of principles of finality. The most important competing considerations noted were "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other". 85 S.Ct. 311.

There is no equitable way for this Supreme Court of last resort to sanction the summary dismissal of petitioner's appeal by the Fifth Circuit as premature. The briefs on the merits have been filed and oral arguments have already been conducted in the Fifth Circuit.

The petitioner received a "separate document" which indicated that an order granting judgment notwithstanding a $670,000.00 unanimous jury verdict had been entered. The district judge further certified that Jones' appeal was

not frivolous but presented a substantial question for the Fifth Circuit to consider.

Without any prospect of further district court action (which occurred almost four months later), appellant had to take an appeal. Filing a second notice of appeal in November of 1987 would have had no practical effect on the substance of the appeal which all parties believed to be already pending in the Fifth Circuit. The last district court judgment was therefore a simple ministerial act of housekeeping which should have no effect on the merits of the petitioner's already pending appeal. The district court had clearly evidenced its intent to grant the judgment notwithstanding the verdict in open court which intent was confirmed by the separate document received by all

counsel herein after its entry on July 14, 1987.

Jetco, supra, is authority within the Fifth Circuit for the finality of the July 14, 1987 order indicating that the motion for judgment notwithstanding the verdict had been granted because that order "adjudicated the claims or the rights and liabilities of all of the parties". Id., p. 1231. Had the jury verdict cast additional defendants in judgment who had not moved for a judgment notwithstanding the verdict, the result would be different. The fact that the order appealed from was duplicated by another act of the trial court (which did not change or alter the effect of the original order) demonstrates the ultimate adjudication conferred by the July 14, 1987 minute entry of the district's court's order.

When the district clerk mails copies of a minute order to all counsel and that order's docket entry included the word "judgment", there is authority for the finality of the order for purposes of appeal. Associated Press v. Taft-Ingalls Corporation, 323 F. 2d 114 (6th Cir., 1963). "The touchstone is the understanding of the court, the parties and the clerk, as evidenced by their actions." Securities & Exchange Commission v. Jean R. Veditz Company, 22 F.R.D. 479, 482 (S.D.N.Y., 1958).

There was no misunderstanding between the parties and there was no objection raised by the respondent as to the finality of the July 14, 1987 minute order. The fact that the district judge signed an order allowing Jones a pauper appeal three weeks after the entry of the minute order certifying that the

appeal was not frivolous and presented a substantial question certainly indicates that the district court considered the appeal properly taken and not premature as the July 14, 1987 order was a final decision. Otherwise, the district judge would have rejected the pauper order as premature informing counsel to resubmit the request after entry of a "final decision".

The United States Supreme Court has held that a separate judgment document is not required to be filed before a decision is "final" for the purpose of appellate review. Banker's Trust Company v. Mallis, 435 U.S. 381, 98 S.Ct. 1117 (1978), rehearing denied 98 S.Ct. 2259. In Banker's, this Court held that "we nonetheless conclude that it could not have been intended that the separate-document requirement of Rule 58

be such a categorical imperative that the parties are not free to waive it." (p. 1119-1120). Banker's holds that:

> Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the Court of Appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose. 98 S. Ct. at 1120.

Banker's also referred to Moore, Federal Practice, in that:

> It must be remembered that the rule is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced...the rule should be interpreted **to prevent loss** of the right to appeal, **not to facilitate loss.** 9 J. Moore, Federal Practice Section 110.08(2), p. 120. n. 7(1970). 98 S.Ct. at 1121.

Banker's then cited Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962) as authority that:

> The same principles of common sense interpretation that led the court in Foman to conclude that the technical requirements for a notice of appeal were not mandatory where the notice 'did not mislead or prejudice' the appellee demonstrates that parties to an appeal may waive the separate-judgment requirements of Rule 58. 'It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for the decisions on the merits to be avoided on the basis of such mere technicalities.' 371 U.S., at 181, 83 S.Ct., at 230.

The recent United States Supreme Court decision in Acosta v. Louisiana Department of Health & Human Resources, 106 S.Ct. 2876 (1986) is directly on point as to the issue of prematurity of appeal. It holds that a notice of appeal filed **before** an order denying the appellant's motion to alter or amend a

judgment was entered on the docket, was premature and ineffective. Conversely, applied to the facts of this case, a notice of appeal filed **after** the order granting the appellee's motion was entered on the docket is therefore timely and effective.

There is obvious conflict among the circuits as to the separate document requirement relative to alleged permature appeals. In Beaudry Motor Company v. Abco Properties, Inc., 780 F. 2d 751 (9th Cir., 1986), the Ninth Circuit held that a docket entry indicating that motions were denied, a copy of which was sent to counsel, was "sufficient compliance" with Rule 58 and was in keeping with the purpose of the separate document requirement.

The purpose of the separate document requirement is to avoid the inequity

caused when a party is denied the opportunity to appeal because of a failure to recognize which of several documents or docket entries constitutes an entry of judgment.

Even if the notice of appeal is premature, where the appellees can demonstrate no prejudice resulting from premature filing, the appeal is considered properly noticed. U.S. v. Price, 688 F. 2d 204 (3rd Cir., 1982); Williams v. Town of Okoboji, 599 F. 2d 238 (8th Cir., 1979).

Although the filing of notice of appeal within the prescribed time limits is a jurisdictional prerequisite to appeal itself, courts should treat a premature appeal as from a judgment so as to avoid the denial of justice, expense and inconvenience in the absence of prejudice to appellees. Yaretsky v.

Blum, 592 F. 2d 65 (2nd Cir., 1979). Thus, the fact that a plaintiff appeals after a district judge gives his opinion but before judgment is filed is not such a substantial defect as to deprive the Court of Appeals of jurisdiction. Bates v. Batte, 187 F. 2d 142 (5th Cir., 1951), cert. denied, 342 U.S. 815, 72 S.Ct. 29, 96 L.Ed. 616 (1951). See also: Woods v. Nicholas, 163 F. 2d 615 (10th Cir., 1947) and Erstling v. Southern Bell T & T Co., 255 F. 2d 93 (5th Cir., 1958).

Most importantly, as is the case here, the provision of Rule 58 requiring that a judgment be set forth on a separate document may be satisfied by the district court after the appeal is docketed. Kirtland v. J. Ray McDermott & Co., 568 F. 2d 1166 (5th Cir., 1978). Kirtland also held that "the entry of

Rule 58 judgments is essentially ministerial in most cases. Id., p. 1169.

The Fifth Circuit has consistently adhered to the policy of exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon. When it is obvious that the overriding intent was effectively to appeal, and no prejudice will result to the appellee, the appellate court is justified in treating the appeal as from a final judgment. Markham v. Holt, 369 F. 2d 940 (5th Cir., 1966); Stokes v. Peyton's Inc., 508 F. 2d 1287 (5th Cir., 1975).

A recent Supreme Court decision, Budinich v. Becton Dickinson & Co., _ U.S. __, 108 S.Ct. 1717, 100 L.Ed. 178

(1988) defines "a final decision generally as one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order." 108 S.Ct. 1720.

It is clear that the most recent Supreme Court trend is to mandate immediate appeal under appellate rule 4 within thirty (30) days after entry of the order appealed from, or the right to appeal is lost. Petitioner Jones herein appealed from the entry of the order granting respondent's motion for JNOV two days **after** the order appealed from was entered. Therefore, petitioner's

appeal is timely under Acosta and Budinich, supra.

CONFLICT IN FIFTH CIRCUIT

Petitioner suggests that the decisions of the Fifth Circuit herein are in conflict with and contrary to the decisions of the United States Supreme Court in Cohen, Gillespie, Dickinson, Banker's Trust, Acosta and Budinich, supra. Furthermore, this Court's decision is in conflict with other Fifth Circuit opinions regarding the requisites of a "final decision" under 28 USC 1291 and the waiver of the separate document requirement under Federal Rule of Civil Procedure 58, particularly when the parties fail to raise the issue, as in Bates, Erstling, Kirtland and Beaudry, a Ninth Circuit opinion, supra.

Furthermore, a recent opinion clearly evidences the conflict existing within the Fifth Circuit on the issue of a "final judgment" and the application of Rule 58. Nagle v. Lee, 807 F. 2d 435 (5th Cir., 1987) held that the Fifth Circuit could take jurisdiction of an appeal despite the contention that there was no "final judgment", but only a minute entry, dismissing a suit. The Fifth Circuit, citing Banker's Trust, supra, ruled that the parties can waive the separate-document requirement where one has accidentally not been entered and reviewed other Fifth Circuit opinions accepting jurisdiction of an appeal from a "final decision" under Sec. 1291, even though no separate-judgment had been entered and the parties failed to raise that issue.

Nagle cites U.S. v. Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed. 2d 202 (1973), a case which mechanically applied Rule 58 and was later modified by the Supreme Court decision in Banker's Trust, supra. There, the Supreme Court held that Rule 58 should be interpreted to prevent loss of the right of appeal, not to facilitate such a loss.

Nagle also cites Hanson v. Town of Flower Mound, 679 F. 2d 497 (5th Cir., 1982), which is also curiously cited by the Fifth Circuit herein as authority for dismissing Jones' appeal. Hanson held that because neither party to the appeal raised the failure to obtain entry of the judgment as a separate document, the Fifth Circuit had jurisdiction and could precede on the merits of the case. Hanson also held

that the Fifth Circuit was free to take jurisdiction of an appeal from a "final decision" under Section 1291, even though no separate judgment had been entered if the parties failed to raise that issue.

The entry of the order herein granting the judgment notwithstanding the verdict was an appealable final decision, and was accepted as such by the petitioner, Jones, the respondents, Celotex and Aetna, (who did not object or raise the issue of the separate document requirement), the district court (which granted Jones a pauper appeal certifying that the appeal was not frivolous and presented a substantial question), and the Fifth Circuit Court of Appeals clerk (who wrote to the district court reporter to

discount her invoice for tardiness of preparation of the record for appeal).

Hanson also cites Sassoon v. U.S., 549 F. 2d 983 (5th Cir., 1977), suggesting that "an exception might be made in a proper case", id., p. 985, further citing the authority relied on by the Supreme Court in Banker's Trust, supra. Petitioner suggests that, if necessary, this is a proper case in which to make an exception, as evidenced by the clear and uncontroverted fact that all of the parties to this proceeding firmly believed that petitioner Jones appealed a final decision **and** in view of the fact that appellees have never objected to the separate document requirement.

ALTERNATIVE ARGUMENT REGARDING MOTION FOR LEAVE TO SECURE CORRECTION OF JUDGMENT FROM DISTRICT COURT

Petitioner Jones also presents an alternative argument as he has filed motions in both the district court and the Fifth Circiut Court of Appeals for leave to correct all judgments of the district court. Defendant, William Walker, was not included in any of the district court judgments and for that reason Jones has filed the appropriate motions in the Fifth Circuit Court of Appeals for leave to secure correction of the district court judgment, which order was granted by the Fifth Circuit on December 23, 1988. The district court rendered a minute entry dated January 31, 1989, entered on February 1, 1989, refusing to correct its judgment as it held:

> When a party defendant is dismissed or abandoned by the plaintiff, then it is not necessary to mention such a party in the judgment for such a judgment to be considered final and appealable.

Respondent secured a formal order from the district court denying the motion for leave to secure correction of judgment which was signed on March 1, 1989, and entered on March 1, 1989. Respondent therefore appealled said order to the Fifth Circuit by the filing of a notice of appeal in the district court on March 9, 1989. This appeal is now still pending with the Fifth Circuit, and briefs have not yet been filed regarding the merits of same.

Respondent therefore suggests that this Supreme Court should, in the alternative, defer consideration and/or stay the pendency of respondent's writ of certiorari until the merits of the

now pending appeal in the Fifth Circuit are resolved, regarding the question of whether defendant, William Walker, should be included in the district court's judgment. If the Fifth Circuit reverses the district court, then the respondent can properly file a notice of appeal and the issue of the prematurity of respondent's initial appeal which has now been dismissed by the Fifth Circuit will become moot by the timely filing of a notice of appeal to the corrected judgment of the district court which would include all defendants, including William Walker, who has not heretofore been included in any of the district court's judgments. Respondent, Edward G. Jones, in the alternative,is also simultaneously filing a Motion To Defer Consideration with this Petition for Writ of Certiorari until such time as

the Fifth Circuit decides the merits of petitioner's remaining appeal, in the interest of judicial economy, in the event the need for this writ becomes moot.

CONCLUSION

This case requires the Supreme Court of the United States to issue a writ of certiorari to the Fifth Circuit Court of Appeals to reinstate this appeal as petitioner Jones has been inequitably deprived of the right to have his appeal decided on its merits. The Fifth Circuit has applied technical and not practical considerations of the principles of finality of judgments. Numerous Supreme Court decisions require the application of substance over form in interpreting the law to prevent loss of the right to appeal, not to facilitate loss of the right to appeal.

The obvious mandate of Cohen, Gillespie, Banker's Trust, Foman, Acosta and Budinich require that this Supreme Court accept jurisdiction over the merits of petitioner's appeal, primarily in view of the fact that respondents, (Celotex and Aetna) never objected to the lack of a separate judgment document required by Rule 58. As was stated in Banker's Trust:

> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for the decision on the merits to be avoided on the basis of such mere technicalities. 371 U.S. 181, 83 S.Ct. 230.

Also, the Fifth Circuit's per curiam decision is contrary and in direct conflict with Acosta, supra, when applied to this case, as it holds that a notice of appeal filed after the order granting the appellee's motion was

entered on the docket is timely and effecitve.

There is no question that Jones' notice of appeal was filed two days after the order granting judgment notwithstanding the verdict was entered. Three weeks later, the district judge confirmed that its order granting judgment notwithstanding the verdict was final when it signed an order granting petitioner Jones a pauper appeal, further certifying that the appeal was not frivolous and presented a substantial question.

Respondents, Celotex and Aetna, have never raised an objection to the appeal brought by Jones until after the Fifth Circuit Court of Appeals raised the question of finality during oral argument on the merits. Therefore **all** parties to this proceeding, until oral

argument, firmly believed that Jones had timely appealled a final decision. These parties include respondents, Celotex and Aetna, the intervenor, Liberty Mutual, the district court judge, and the clerks of both the district and appellate courts.

Since the Supreme Court has on numerous occasions clearly directed the appellate courts to use practical and not technical construction of the principles of finality to prevent loss of the right to appeal, not to facilitate loss, Jones suggests that it is necessary for this Supreme Court to issue a writ of certiorari in this matter due to the obvious conflict of the Fifth Circiurt's per curiam opinions with the clear and equitable reasoning of the United States Supreme Court in the aforementioned cases.

Furthermore, the Fifth Circuit per curiam opinion is in direct conflict with other Fifth Circuit cases such as Bates, Erstling, Kirtland, Markham and Stokes, which clearly mandate that the Federal Courts should "exercise all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon". Stokes, supra, p. 508. Where the overriding intent was effectively to appeal, and no prejudice will result to the appellee, we are justified in treating the appeal as from a final judgment. Markham, p. 942.

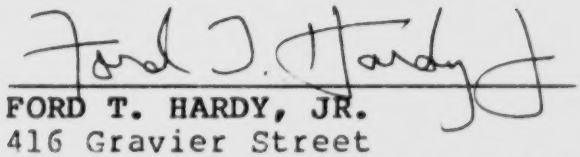
The Fifth Circuit's per curiam opinion is incorrect and in direct conflict with oth r Fifth Circuit cases and numerous Supreme Court cases cited

herein. Furthermore, these holdings are in direct conflict with the facts of this case as the district court judge certified three weeks after Jones filed notice of appeal that Jones was entitled to a pauper appeal because the appeal was not frivolous but presented a substantial question. Obviously, that substantial question is whether the district court was correct in granting a judgment notwithstanding a $670,000.00 jury verdict on July 8, 1987.

Petitioner, Edward G. Jones, prays that this court issue a writ of certiorari herein directing the Fifth Circuit to accept jurisdiction of this appeal as petitioner has been unjustly

deprived of a decision on the merits based on mere technicalities.

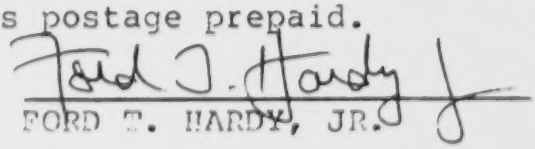
RESPECTFULLY SUBMITTED:



FORD T. HARDY, JR.
416 Gravier Street
New Orleans, Louisiana 70130
(504) 561-0514
Attorney for Appellant
La. Bar #6546

CERTIFICATE OF SERVICE

Undersigned counsel for petitioner hereby certifies that he has on the 1st day of June, 1989, served a copy of the foregoing petition for writ of certiorari on counsel for all parties to this proceeding, including Mr. Pene Pastorek, attorney for respondents, and Ms. Kathleen Hill, attorney for interventor, by mailing the same by United States Mail, properly addressed, and first class postage prepaid.



FORD T. HARDY, JR.

APPENDIX A

JULY 8, 1987

85-491

EDWARD G. JONES VS. THE CELOTEX CORPORATION, ET AL

MOTION OF CELOTEX CORPORATION AND AETNA CASUALTY & SURETY CO. FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL.

ARGUED. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT GRANTED.

Appearances: Ford Hardy - Plaintiff
Rene Pastorek - Defendants

Courtroom Deputy-Pam Polk
Court Reporter - Pat Duroncelet

DATE OF ENTRY July 14, 1987

APPENDIX B

CIVIL DOCKET CONTINUATION SHEET

DATE	NR	PROCEEDINGS
7/8/87	88	Hrg on mtn by Celotex Corp & Atena for judg notwithstanding the verdict or in the alternative for new trial - mtn for judg notwithstanding verdict GRANTED. (RFC) dktd 7/14/87.
7/16/87	89	Pltf's ntc of appeal from amended judg entered 7/14/87.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	*	CIVIL ACTION
VERSUS	*	NO. 85-491
THE CELOTEX CORPORATION, et al.	*	SECTION "C"
* * * * *	*	MAG. DIV. 5

NOTICE OF APPEAL

Notice is hereby given that Edward G. Jones, Plaintiff in the above-captioned matter, hereby appeals to the United States Court of Appeal for the Fifth Circuit from the Amended Judgment entered in this action on the 14th day of July, 1987.

New Orleans, Louisiana, this 16th day of July, 1987.

RESPECTFULLY SUBMITTED:

/s/ FORD T. HARDY, JR.
FORD T. HARDY, JR.
416 Gravier Street
New Orleans, Louisiana 70130
(504) 561-0514
Attorney for Plaintiff
La. Bar #6546

/s/ RICHARD M. MARTIN, JR.
JOHN J. CUMMINGS, III
RICHARD M. MARTIN, JR.
Cummings, Cummings & Dudenhefer
416 Gravier Street
New Orleans, Louisiana 70130
(504) 586-0000
Attorneys for Plaintiff

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	*	CIVIL ACTION
VERSUS	*	NO. 85-491
THE CELOETEX CORPORATION, et al.	*	SECTION "C"
* * * * *	*	MAG. DIV. 5

EX PARTE MOTION FOR PAUPER APPEAL

NOW INTO COURT, through undersigned counsel, comes plaintiff, Edward Gregory Jones, who upon suggesting to this court that he has filed a notice of appeal herein on July 16, 1987, that plaintiff has prosecuted this matter as a pauper, by order of this court dated February 1, 1985, that he still lacks sufficient means to pay for the cost of the transcript herein on appeal, therefore moves this court for an order granting plaintiff pauper standing on his appeal, thereby to have the transcript prepared

in this matter at government expense, and for all other general and equitable relief as the law and the facts may warrant and that the appeal is not frivolous but presents a substantial question.

RESPECTFULLY SUBMITTED:

/s/ FORD T. HARDY, JR.

FORD T. HARDY, JR.
416 Gravier Street
New Orleans, Louisiana 70130
(504) 561-0514
Attorney for Plaintiff
La. Bar #6546

DATE OF ENTRY AUG 10 1987

ORDER

Considering the foregoing ex parte motion for pauper appeal;

IT IS HEREBY ORDERED that plaintiff, Edward G. Jones, be hereby granted a pauper appeal, thereby further ordering that the transcript of all testimony in this matter be prepared and forwarded to the 5th Circuit Court of Appeals, at government expense, as that the appeal is not frivolous and presents a substantial question.

New Orleans, Louisiana, this 6th day of August, 1987.

/s/ JUDGE ROBERT F. COLLINS

APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

October 19, 1987

Mrs. Loretta G. Whyte, Clerk
United States District Court
500 Camp Street
Room C-151
New Orleans, LA 70130

No. 87-3515 - Jones, Et Al. v. The Celotex Corporation, Et Al.

(USDC No. CA-85-491-C (5))

Dear Mrs. Whyte:

In this case, the 60 day discount period expired on October 4, 1987 and, to this date, the transcript has not been filed. Therefore, I am advising you that the court reporter will be required to discount her invoice by 10%. If the transcript is not filed by

November 3, 1987, a 20% discount must be made.

I am writing to you because the case is proceeding in forma pauperis with the transcript to be paid at the expnse of the United States.

Sincerely,

/s/ GILBERT F. GANUCHEAU

Gilbert F. Ganucheau
Clerk

GFG/jmg
cc: Mr. Ford T. Hardy, Jr.
Ms. Kathleen W. Will
Mr. Rene A. Pastorek
Ms. Patricia Duroncelet

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	CIVIL ACTION
VERSUS	NO. 85-491
THE CELOETEX CORPORATION, et al.	SECTION "C"(5)

* * * * * * * * * *

JUDGMENT

The jury having duly rendered its verdict, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Edward G. Jones, and against The Celotex Corporation and Aetna Casualty and Surety Company, in the amount of $670,000.00 with interest at the legal rate from date of judicial demand and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Salvage One

Demolition Co., be hereby dismissed with prejudice for failure to prosecute.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Loretta G. Whyte
Clerk

Approved as to form:

/s/ JUDGE ROBERT F. COLLINS

DATE OF ENTRY APR 9 1987

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EDWARD G. JONES	CIVIL ACTION
VERSUS	NO. 85-0491
THE CELOETEX CORPORATION, et al.	SECTION "C"(5)

* * * * * * * * *

J U D G M E N T

The Court having granted defendant's motion for judgment notwithstanding the verdict, accordingly;

IT IS ORDERED, ADJUDGED and DECREED that there be Judgment in favor of defendants, Celotex Corporation, and Aetna Casualty and Surety Company, and against plaintiff, Edward G. Jones, dismissing the complaint with prejudice, with each party bearing their own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Salvage One Demolition Co.

by dismissed with prejudice for failure to prosecute.

New Orleans, Louisiana, this 30th day of October, 1987.

/s/ Loretta G. Whyet
Clerk

APPROVED AS TO FORM:

/s/ JUDGE ROBERT F. COLLINS

DATE OF ENTRY NOV 2 1987

APPENDIX H

Edward G. JONES, Plaintiff-Appellant,

and

Liberty Mutual Insurance Company, Intervenor-Appellant,

v.

The CELOTEX CORPORATION, A Wholly Owned SUBSIDIARY OF THE JIM WALTER CORPORATION, and Aetna Casualty and Surety Company, Defendants-Appellees.

No. 87-3515,

United States Court of Appeals,

Fifth Circuit.

March 7, 1989.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 14, 5th Cir., 1988, 857 F.2d 273)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

Following publication of our original opinion in this case, we granted Jones' motion for leave to secure correction of judgment in the district court. In the district court Jones sought to have the October 30, 1987 judgment corrected on the grounds that it did not mention one of the defendants in this case, William Walker. The district court refused to correct its judgment, finding that Jones had abandoned the claim against William Walker.

[1,2] The subsequent action by the district court does not render the October 30, 1987 judgment non-final. An order that effectively ends the litigation on the merits is an

appealable final judgment even if the district court does not formally include judgment on a claim that has been abandoned. Baltimore Orioles, Inc., v. Major League Baseball Players Ass'n., 805 F.2d 663, 667 (7th Cir.1986), cert. denied, 480 U.S. 941, 107 S.Ct. 1593, 94 L.Ed.2d 782 (1987). Since there was no notice of appeal following the October 30, 1987 final judgment, our opinion properly dismissed the case for lack of jurisdiction.

We note that the dismissal does not result in inequity to Jones. The facts in the record plainly support the judgment notwithstanding the verdict. Absent the jurisdictional defect, the judgment surely would have been affirmed.

In all other respects, the petition for rehearing is denied and no member of

this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the suggestion for Rehearing En Banc is DENIED.

APPENDIX I

Edward G. JONES, Plaintiff-Appellant,

and

Liberty Mutual Insurance Company, Intervenor-Appellant,

v.

The CELOTEX CORPORATION, A Wholly Owned SUBSIDIARY OF THE JIM WALTER CORPORATION, and Aetna Casualty and Surety Company, Defendants-Appellees.

No. 87-3515,

United States Court of Appeals,

Fifth Circuit.

Oct. 14, 1988.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

Edward G. Jones attempts to appeal the judgment notwithstanding the verdict granted by the district court. Because no notice of appeal was filed after judgment was entered this court is without jurisdiction.

I.

Appellee Celotex Corporation is the owner and operator of a manufacturing plant located in Louisiana. Appellant Jones was an employee of Salvage One Demolition Co. a/k/a Southern States Demolition Co. ("Salvage One"). Salvage One contracted with Celotex to demolish certain buildings at the plant. During the demolition of one of the buildings, Jones was injured when the part of the structure on which he was working collapsed. At trial, appellant attempted to show that Celotex controlled the method and means by which

Salvage One performed its job. Celotex, on the other hand, produced evidence to prove that Salvage One carried out its function as an independent contractor and made all material decisions as to how the buildings would be demolished. The jury found Celotex to be negligent and awarded damages of $670,000.00 to Jones. The district court adopted the verdict of the jury and entered judgment on April 9, 1987.

Celotex moved for a judgment notwithstanding the verdict or in the alternative for a new trial. The district court held a hearing on the motion on July 8, 1987. At the hearing, the district court orally granted the motion for judgment notwithstanding the verdict and advised that he would provide his written opinion later. On that same date, the district court clerk

made the following minute about the hearing: "Motion of Celotex Corporation and Aetna Casualty and Surety Company for Judgment Notwithstanding the Verdict or in the Alternative for New Trial. Argued. Motion for Judgment Notwithstanding Verdict Granted." The clerk entered this minute entry on the docket on July 14, 1988 with the following notation: "Hrg on mtn by Celotex Corporation & Aetna for judg notwithstanding the verdict or in the alternative for new trial-mtn for judg notwithstanding verdict GRANTED." On July 16, 1987, Jones filed a notice of appeal "from the Amended Judgment entered in this action on the 14th day of July, 1987."

On October 30, 1987 the district court issued a written opinion granting the motion for judgment notwithstanding

the verdict. 683 F. Supp. 555. On that same date, the clerk prepared and signed a separate document entitled "Judgment." This document was approved as to form by the district court, and entered on the docket on November 2, 1987. Jones did not file a notice of appeal after judgment was entered.

II.

We raise the question of our own jurisdiction sua sponte. Under 28 USC Section 1291, "[t]he courts of appeals ... have jurisdiction of appeals from all final decisions of the district courts of the United States." Federal Rule of Appellate Procedure 4(a)(4) prescribes the timing for an appeal from a judgment notwithstanding the verdict:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by a party: (i) for judgment under Rule 50(b); ... the time

> for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any such other motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

[1,2] The time within which a notice of appeal must be filed begins to run on the date of entry of a judgment. A judgment is not entered within the meaning of Fed.R.App.P. 4(a)(4) unless it is entered in compliance with Federal Rules of Civil Procedure 58 and 79(a). Fed.R.App.P. 4(a)(6). Rule 58 requires that every judgment be set forth in a separate document,[1] and Rule 79(a)

---

[1] Federal Rules of Civil Procedure 58 provides in part:

> [U]pon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the

requries the district court clerk to enter the judgment in the docket.[2] In

---

> clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court.... Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

[2] Federal Rules of Civil Procedure 79(a) provides in part:

> The clerk ... shall enter [in the civil docket] each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers.... All papers filed with the clerk, ... all appearances, orders, verdicts, and judgments shall be entered chronoligically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court.... The entry of an order or judgment shall show the date the entry is made.

this case, no separate judgment was set forth as required by Fed.R.Civ.P. 58 until October 30, and no entry was made in accordance with Fed.R.Civ.P. 79(a) until November 2. A notice of appeal in ineffective unless filed after entry of judgment on a motion for judgment notwithstanding the verdict. Fed.R.App.P. 4(a)(4); Acosta v. Louisiana Dep't of Health and Human Resources, 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed. 2d 192 (1986).

[3,4] We have held that we may take jurisdiction of an appeal from a "final decision" under Section 1291, even though no separate judgment has been entered, when the parties fail to raise the issue. Hanson v. Town of Flower Mound, 679 F.2d 497 (5th Cir., 1982). However, the parties cannot waive the separate document rule of Fed.R.Civ.P.

58 if there has been no "final decision." The minute entry of the clerk dated July 14, 1987, did not constitute a "final decision." This court succinctly stated the law in Pure Oil Co. v. Boyne, 370 F.2d 121 (5th Cir., 1966):

> The only act on the part of the court was oral, and the only written evidence of such action was the minute entry of the clerk. Even prior to the added requirement of Rule 58, this minute entry alone could not stand as a final judgment of the district court. (Courts render judgment; clerks only enter them on court records.)

Id. at 123 (quoting Burke v. Comm'r of Internal Revenue, 301 F. 2d 903 (1st Cir., 1962)). See also Wood v. Coast Frame Supply, Inc., 779 F.2d 1441 (9th Cir.), amended 791 F.2d 802 (1986).

III.

Final judgment was not entered in this case until November 2, 1987. Since

no appeal was filed after that date, we lack jurisdiction. Accordingly, the appeal is

DISMISSED.

APPENDIX J - Statutes

RULE 4. Appeal as of Right-When Taken

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it

shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or

make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not

later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) Appeals in Criminal Cases. In a criminal case the notice of appeal by a

defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized

by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the disctrict court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

As amended Apr. 30, 1979, eff. Aug. 1, 1979.

APPENDIX K

Rule 54. Judgments; Costs

(a) Definition; form

"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon multiple claims or involving multiple parties

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is

rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX L

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in

Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963.)

APPENDIX M

Rule 60. Relief from Judgment or Order

(a) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of any appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal

representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time, and

for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX N

Rule 79. Books and Records Kept by the Clerk and Entries Therein

(a) Civil Docket. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronoloigcally in the civil

docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil Judgments and Orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every

final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) Indices; Calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) Other Books and Records of the Clerk. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts, with the

approval of the Judicial Conference of the United States.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963.

APPENDIX O

28 U.S.C. Section 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, The United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(As amended Apr. 2, 1982, Pub.L. 97-164, Title I, Section 124, 96 Stats. 36.)

APPENDIX P

28 U.S.C. Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from

the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a

case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his

application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(June 25, 1948, c. 646 Stat. 961; May 24, 1949, c. 139, Section 106, 63 Stat. 104.)

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(As amended Pub.L. 98-209, Section 10(b), Dec. 6, 1983, 97 Stat. 1406.)

88-1937

NO. 88-1937

Supreme Court, U.S.
FILED
SEP 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1988

EDWARD G. JONES,
Petitioner

VERSUS

THE CELOTEX CORPORATION and
AETNA CASUALTY & SURETY COMPANY,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

RENE' A. PASTOREK
Bar Number: 10410
P. O. Box 1478
Gretna, LA 70054-1478
Telephone: (504) 368-9883
Attorney for Respondents

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Issue 1

Facts 1

Summary of Argument 4

Argument 5

Motion to Correct Under Rule 60 18

Conclusion 19

Certificate of Service 20

APPENDIX:

Appendix A - Judgment signed and entered April 9, 1987 . . . . . A-1

Appendix B - Minute Entry of July 8, 1987 . . . . . A-2

Appendix C - Minute Entry of July 14, 1988 . . . . . A-4

Appendix D - Judgment of November 7, 1987 . . . . . A-14

Appendix E - Court of Appeals per curiam dated 10-14-88 . . . . . A-15

Appendix F - Court of Appeals per curiam dated 3-7-88 . . . . . A-20

TABLE OF AUTHORITIES

CASE — Page

Acosta v. La. Dpt. of Health & Human Resources, 478 U.S. 251, 106 S. Ct. 2876, 92 L.Ed.2d, 192, (1986) 9,18

Allen v. Horek, 827 F.2d 673 (1987) 11,12

Associated Press v. Taft-Ingalls Corporation, 323 F.2d 114 (6th Cir. 1963) 14

Banker's Trust Company v. Maliss, 435 U.S. 381, 98 S. Ct. 1117, 55 L. Ed.2, 357 (1978) 17,18

Bates v. Batte, 187 F 2d 142 (5th Cir. 1951) 13

Beaudry Motor Company v. Abco Properties, Inc., 780 F. 2d 751 (9th Cir. 1986) 17

Bronson v. LaCrosse & M. Railroad Company, 2 Black 524, 531, 17 L. Ed. 347, 359 11

Brown Shoe Company v. United States, 370 U.S. 294, 306, 82 S.Ct. 1502 (1962) 10

Calhoun v. United States, 647 F.2d 6, at 11 (9th Cir., 1981) 10

Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221, (1949) 10

Dickerson v. Petroleum Conversion Corp., 338 U.S. 507, 70 S. Ct. 322, 95 L. Ed. 299 (1950) 11

Foremost Sales Prom. v. Dir. Bur. of Alcohol, etc., 812 F. 2d 1044 (1987) 11

Forgay v. Conrad, 6 How. 201, 203, 12 L. Ed. 404 11

Foman v. Davis, 371 U.S. 178, 83 S. Ct. (1962) 14

TABLE OF AUTHORITIES

CASE Page

Gillespie v. United States Steel Corporation, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964) 10

Hanson v. Town of Flower Mound, 679 F. 2d 497 (5th Cir. 1982) 17

Jetco Electronic Industries, Inc. v. Gardiner, 473 F. 2d 1228 (5th Cir. 1973) 13

Markham v. Holt, 369 F. 2d 940 (5th Cir. 1966) 15

Rappaport v. U. S., 557 F. 2d 605 (1977) 11,12

Sassoon v. U. S., 549 F. 2d 983 (5th Cir. 1977) 16

Securities & Exchange Commission v. Jean R. Veditz Company, 22 F.R.D. 479 (1958) 14

U. S. v. Indrelunas, 411 U. S. 216, 36 L. Ed. 2d 202, 93 S. Ct. 1562 (1973) 16

United States v. F. & M. Shafer Brewing Company, 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 271 (1958) 7,8,14,15

Ursling v. Southern Bell Telephone & Telegraph Company, 255 F.2d 93 (5th Cir. 1958) 14

Williams v. Town of Okoboji, 599 F. 2d 238, 239-240 (8th Cir., 1979) 10

Wood v. Coast Frame Supply, Inc., 779 F. 2d 415 amended 791 F. 2d 802 (1986) 11

Woods v. Nicholas, 163 F.2d 615 (10th Cir., 1947) 13

ISSUE

Respondents believe that the questions presented for review are inaccurately stated by petitioners.

The real issue is, does a United States Court of Appeal have jurisdiction of an appeal from a written minute made by a deputy clerk of a district judge's announced decision that he grants a motion for judgment N.O.V. and will file reasons later, which minute entry is entered on the docket by the clerk and from which plaintiff appeals within two days and when the district judge later permits, ex parte, a pauper appeal and about three months after the court's announcement, files reasons for judgment and the clerk prepares and signs a formal judgment which the clerk enters in the docket and from which no appeal was taken, nor can any be taken because of the passage of time.

The Fifth Circuit Court of Appeals held that it did not have jurisdiction and dismissed the appeal.

This decision was correct and equitable. Its decision was not in conflict with any decision of this court, and not in conflict with other decisions of the Fifth Circuit Court of Appeals.

FACTS

The issue presented above contains all of the material facts but it may be wise to summarize the context and give the material facts in more detail.

This was a diversity suit by an injured workman against the owner of a plant which his employer contracted to demolish. The matter was tried to a jury and at trial petitioner attempted to show that the owner controlled the

method and means by which his employer performed his job and on the other hand the owner produced evidence to prove that the contractor carried out his functions as an independent contractor. The jury found the owner to be negligent and awarded damages of $670,000 to Jones. The district court adopted the verdict of the jury and the judgment was signed and entered on April 9, 1978. See Appendix "A" attached.

Celotex moved for a judgment notwithstanding the verdict or in the alternative for a new trial. The district court held a hearing on the motion on July 8, 1987. At the hearing, the district court orally granted the motion for judgment notwithstanding the verdict and advised that he would provide written reasons later. On that same date, the district court deputy clerk made the following minute or minute entry about the hearing:

> "Motion of Celotex Corporation and Aetna Casualty & Surety Company for judgment notwithstanding the verdict or in the alternative for new trial. Argued. Motion for Judgment Notwithstanding the Verdict. Granted." See Appendix "B" attached.

The clerk entered his minute entry on the docket on July 14, 1988 with the following notation:

> "Hrg on mtn by Celotex Corp. & Aetna for judg Notwithstanding the Verdict or in the Alternative for New Trial - mtn for judg notwithstanding verdict Granted." See Entry 85 Appendix "C" attached.

Two days later, on July 16, 1987, petitioner filed a notice of appeal "from the amended judgment entered in this action on the 14th day of July, 1987."

On October 30 the district court issued a written opinion granting the motion for judgment notwithstanding the verdict. 683 F.Supp. 555. On that same date the clerk prepared and signed a separate document entitled "Judgment". This document was approved as to form by the district court and entered on the docket on November 2, 1987. See Appendix "D" attached. Plaintiff did not file a new notice of appeal after judgment was entered.

The court of appeals raised the question of its own jurisdiction sua sponte.

Finding that the minute entry of the clerk dated July 14, 1987 did not constitute a final decision, the court held that the appeal from the minute entry or announcement of the court's decision was under Federal Rule of Appellate procedure 4a(4) a nullity and because no appeal was filed after the entry of the October 30 judgment, the court lacked jurisdiction and the appeal was dismissed. See Appendix "E" attached.

In the meantime, petitioner's counsel having been told of the problem by the court at argument in August 1988, petitioner obtained leave of the Fifth Circuit of the Court of Appeals to seek an amendment or correction of the October 30, 1987 judgment, under Rule 60. The court of appeals granted petitioner the right to seek an amendment or correction of the judgment in the district court and plaintiff based his motion on the fact that a party whom petitioner sued was not included in the judgment dismissing plaintiff's claims and therefore under Rule 54b, the judgment of October 30, 1987, which, when corrected, would be dated currently and he would then have a right to appeal from that judgment. However, the district court held that petitioner had abandoned his claims against the defendant not mentioned in the judgment and that occurred before

the court of appels acted on petitioner's petition for rehearing and for rehearing en banc. In its per curiam denying the petition for rehearing and for rehearing en banc, the court of appeals took note of the fact that the district court had refused to correct its judgment because it found that petitioner had abandoned his claim against the defendant not mentioned in the October 30, 1987 judgment. The court of appeals held that the subsequent action by the district court did not render that judgment non-final because that judgment is an appealable final judgment even if the district does not formally include judgment on a claim that has been abandoned and since there was no notice of appeal following the October 30, 1987 final judgment, its previous opinion properly dismissed the case for lack of jurisdiction. See Exhibit "6" attached.

The court of appeals noted that no inequity would flow to Jones' because the facts in the record plainly supported the judgment notwithstanding the verdict.

SUMMARY OF ARGUMENT

Respondents summarize their argument that this court should not grant a writ of certiorari to the Fifth Circuit Court of Appeals as follows:

The minute entry of July 8, 1987 made by the deputy clerk that the respondent's motions for judgment N.O.V. and new trial had come on for hearing, had been argued and the court granted the judgment N.O.V. was not a final judgment or final decision or final disposition and no judgment was signed and entered until November 2, 1987. Petitioner's Notice of Appeal was prematurely filed on July 16, 1987 based, not on a judgment that had been signed and entered by the Clerk of Court, but rather on the trial court's oral ruling and subsequent minute entry in the docket that

defendant's motion for judgment notwithstanding the verdict had been granted. A clerk's minute entry evidencing a district court's oral decision is not a final appealable order.

The Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure clearly provide that a notice of appeal must be filed within thirty days after the date of entry of a judgment or order appealed from. To be timely filed, the notice must be filed within thirty days of the entry of the order denying a new trial or granting or denying of any other such motion. A notice of appeal filed before the final disposition shall have no effect. If a notice of appeal had been filed too early, then a new notice of appeal must be filed within thirty days after the entry of judgment.

Furthermore, pursuant to the provisions of Federal Rules of Civil procedure, when the court's decision denies the plaintiff all relief, the Clerk of Court must prepare, *sign* and enter a judgment without awaiting any direction by the court. Additionally the judgment must be on a separate document and the judgment is effective only when so prepared and so entered.

ARGUMENT

The Clerk's minute entry evidencing the district court's oral decision is not a final appealable order; the entry of a final written judgment by the district court is required.

A reading of Rule 58 and the jurisprudence clearly indicates that there are at least four requirements for a final judgment or order.

1) The judgment must be in writing;

2) The judgment must be a separate document;

3) It must be signed by the clerk and in some cases approved by the judge' and,

4) It must clearly evidence on its face, that one or more, or all issues in the case are finally disposed of by the District Court.

Arguably, the minute entry of July 8, 1987, satisfies the requirement that a judgment ought to be in writing and may meet the separate document requirement, but clearly it is not signed by anyone and therefore it cannot meet the third requirement mentioned above.

Finally, it does not clearly evidence on its face that one or more issue or all issues in the case are finally disposed of by the District Court. The judgment of April 8, 1987, was still in existence. The court had to recall, vacate and set aside that judgment and nothing in the minute entry indicates that the court ordered that the judgment of April 8, 1987 be recalled, vacated and set aside and only by reading the whole record would one be able to tell what the granting of the motion for Judgment Notwithstanding the Verdict settled in the case. The Motion for Judgment Notwithstanding the Verdict may have been as to only one issue in the case and not all and not fully dispositive of the plaintiff's claim. The clerk, in order to enter a judgment based on the minute entry would have had to literally interpret the record to determine whether or not a judgment ought to be entered in favor of the defendants dismissing plaintiff's suit.

Finally, had the minute entry of July 8, 1987 been in favor of plaintiff, that minute entry would not be sufficient for the clerk to issue a writ of seizure nor for the Marshall

to seize any property. It is exactly what it seems to be and that is a minute entry and it does not have the formality, certainty and dignity of a final judgment.

Before reviewing the case law on the subject, it is important to understand the chronology of certain changes made in the Federal Rules of Civil Procedure dealing with final judgments and also the adoption of the Federal Rules of Appellate Procedure in 1967. Prior to 1963, Rule 58 of the Federal Rules of Civil Procedure did not contain the requirement that the judgment be set forth on a separate document and that a judgment is effective only when so set forth and when entered as provided by Rule 79A. The separate document requirement apparently grew out of the case of *United States v. F. & M. Shafer Brewing Company,* 356 U.S. 227, 78 S. Ct. 674, 2 L. Ed. 2d 271 (1958). Following the district court filing an opinion granting summary judgment against the government, the clerk duly noted the fact in the docket. Sometimes later a formal judgment was entered, the government appealed from the latter. The appellee insisted that the earlier opinion was the judgment and the appeal from it was too late. The government insisted that as a practical matter a final judgment should be contained in a separate document so labeled. The court found no statute or rule that so required and concluded that the decisional law was clear to the effect that no form of words was necessary to evince rendition of a judgment. In the court's view the question of whether the opinion was a judgment depended "upon whether the judge has or has not clearly declared his intention in this respect and his opinion." To have dependability depend upon an interpretation of the district court's language seemed an unnecessary complication so Rule 58 was amended to provide that a judgment was to be prepared in all cases and that it was to "be set forth on a separate document." The rule does not provide that a judgment be so labeled as the government

contended it should be in *Shafer,* supra. Thus, many of the cases cited by petitioner predate the Shafer case and the adoption of the requirement that judgment be set forth on a separate document and that a judgment is effective only when so set forth.

In addition, in 1967 the Supreme Court, having been granted the power to do so by Congress, adopted Federal Rules of Appellate Procedure. However, Rule 4a(4) being pertinent to this appeal wasn't adopted until 1979. It provides as follows:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); . . . (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing."

Prior to 1979, there was no provision in any of the Federal Rules of Appellate Procedure which required that an appeal taken before the final disposition of a Motion for Judgment N.O.V. and/or for New Trial be considered a nullity and that a new appeal must be taken after the entry of the final judgment or order disposing of the motion but no further additional fees shall be required for such filing.

Thus, cases prior to 1979 which appear to be analogous to the facts of this case usually have no meaning

and certainly no decisional effect because they could not and did not deal with the clear requirements of Rule 4a(4) and those before 1963 did not deal with language in Rule 58 that provided that a judgment shall be set forth on a separate document.

Cases since 1979 however, have been unanimous in holding that a minute entry that the judge verbally announced a decision is not of such dignity as judgments are required to be under Rule 58.

The decision of this court in *Acosta v. La. Dpt. of Health & Human Resources,* 478 U.S. 251, 106 S. Ct. 2876, 92 L.Ed.2d, 192, (1986) involved a district court which granted attorney's fees because petitioner had filed an action in bad faith, the petitioner filed a timely motion to alter or amend the judgment under Rule 59 and the district court held a hearing on the motion and denied it from the bench. Petitioner filed a notice of appeal that same day. Not until two days later, however was the order denying the motion to alter or amend the judgment entered on the docket and the petitioner never filed a new notice of appeal following the docket entry. This court, finding a conflict between a decision of the Ninth Circuit and the Fifth circuit in which *Acosta,* supra arose, adopted the Fifth Circuit's interpretation of Rule 4a(4). The Ninth Circuit had held that Rule 4a(4) did not control nor render a notice of appeal filed after the announcement of the decision on the motion but before the entry of the order a nullity. The Ninth Circuit concluded that the term "disposition" as used in the rule was synonymous with "announcement" and accordingly a notice of appeal could be given effect as long as it was filed after the trial court's "announcement" of its ruling. The Ninth Circuit concluded that this interpretation of the rule was justified by the "policy of 'exercising all proper means to prevent the loss of valuable rights when

the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon.'" (Quoting *Williams v. Town of Okoboji*, 599 F. 2d 238, 239-240 (8th Cir., 1979), and the court reasoned that if a notice filed before entry of the order were deemed defective, "valuable rights (might) be lost because an important, but ministerial act, was not performed when expected." (Quoting from *Calhoun v. United States*, 647 F. 2d 6, at 11 (9th Cir., 1981).

This court had no hestitancy in finding that Rule 4a(4) was an exception to Rule 4a(2) which provides that a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof. This court held that:

> ". . . a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies." P. 254.

Except for *Acosta*, supra, in the Fifth Circuit and *Calhoun*, supra, there were no other cases brought to the attention of this court at that time, just three years ago.

Furthermore, cases cited by petitioner such as *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221, (1949) and *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964), which deals with orders which are otherwise interlocutory but which this court has held are final because they are fundamental to the further conduct of the case, *Brown Shoe Company v. United States*, 370 U.S. 294, 306, 82 S.Ct. 1502 (1962) which deals with a decision of the district court which found that a party had violated the

Clayton Act but reserved a ruling on a specific plan for implementing the divestiture followed an old pattern of judgments in two stages in antitrust cases and the first judgment was final, *Forgay v. Conrad*, 6 How. 201, 12 L. Ed. 404 and *Bronson v. La Crosse & M. Railroad Company*, 2 Black 524, 531, 17 L. Ed. 347, involving two stage proceedings where the court held a sale to be null because fraudulently undertaken and ordered an accounting for rents and profits, and *Dickerson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S. Ct. 322, 95 L. Ed. 299 (1950) which deals with the dismissal of one claim in multi-claim litigation prior to the adoption of Rule 54b, have no bearing on this case except for general rules that appeals are to be favored; that in deciding the question of finality the most important competing considerations are the inconvenience and cost of piece meal review on the one hand and the danger of denying justice by delay on the other; and that the requirement of finality is to be given a practical rather than a technical construction.

In this case, however, we have a petitioner appealing from a minute entry noting the judges announcement of a decision and the entry of that announcement but no formal judgment or order. A clerk's minute entry evidencing the district court's oral decision is not a final appealable order; the entry of a final written judgment by the district court is required. The Seventh Circuit has so held in *Foremost Sales Prom. v. Dir. Bur. of Alcohol, etc.*, 812 F. 2d 1044 (1987) as it had previously in *Rappaport v. U. S.*, 557 F. 2d 605 (1977). The Ninth Circuit had so held in *Wood v. Coast Frame Supply, Inc.*, 779 F. 2d 415 amended 791 F. 2d 802 (1986) as has the Tenth Circuit in *Allen v. Horek*, 827 F.2d 673 (1987) and the Fifth Circuit in this case.

The facts in *Wood*, supra are identical to the facts of this case. After plaintiffs filed their petition, the defend-

ants moved for summary judgment and during oral argument, the district judge indicated on the record that he intended to grant summary judgment for all defendants on all but a fraud cause of action. No memorandum of decision or signed order appeared in the record nor did the record reflect that the clerk entered summary judgment in favor of defendants on such claims. Appeal was taken from the district court's rulings granting summary judgment. The court held that a court room deputy clerk's minute order evidencing the district court's oral decision is not a final appealable order.

In *Rappaport*, supra, a district court filed a memorandum decision concluding with "defendant's motion for summary judgment is granted". On a form similar to the form used by the Eastern District of Louisiana in this case the same sentence was inserted and then that sentence was reflected in a docket entry. Plaintiff's notice of appeal from the district court granting summary judgment in favor of the defendant was dismissed because the minute order was not a judgment set forth in a separate document and no appeal could lie from a judgment except when so set forth and when entered as provided in Rule 79a.

In *Allen*, supra, the Tenth Circuit held similarly. There the district court announced its decision orally and the deputy clerk put that fact on the court room minute sheet and the same information "Hearing on motion for new trial - denied. Order to follow" was entered on the docket. Plaintiff filed a notice of appeal within thirty days of the announced decision and the entry of same on the court room minute sheet and the docket but the court didn't render judgment until after the appeal was taken. The Tenth Circuit finding no distinction in that case and *Acosta* ruled that the appeal taken by the plaintiff was a

nullity because the minute order of the court's verbal announcement of its decision was not a separate order set forth as required by Fed. R. Civ. P. 58. No appeal could lie because there was not a final judgment until the court finally entered a final judgment denying the motion for new trial about twenty days later. No appeal having been taken from that order, the court held it was without jurisdiction to hear any appeals.

The cases cited by petitioner in addition to those mentioned above shed little or no light on the present case. Petitioner cites *Jetco Electronic Industries, Inc. v. Gardiner,* 473 F. 2d 1228 (5th Cir. 1973) for the proposition that "practical rather than technical" considerations are to govern the application of principals of finality and respondent does not dispute this. Respondent, however, disputes the assertion that Jetco is authority within the Fifth Circuit for the finality of the July 14, 1987 minute entry indicating that the motion for judgment notwithstanding the verdict had been granted because that order "adjudicated the claims or the rights and liabilities of all the parties." *Id.*, page 1231. The factual situation of Jetco is in no way analogous to the facts of this case. There were two final judgments, each against separate defendants, but no judgment incorporating all of them and no Rule 54b problem and not a question of whether a judgment was final in a most elementary sense.

Woods v. Nicholas, 163 F.2d 615 (10th Cir., 1947) has an analogous factual situation but again the court was not dealing with the same rules that apply now. There was no Rule 4a(4) of, nor any appellate rules of procedure at all at that time.

Bates v. Batte, 187 F.2d 142 (5th Cir., 1951) is another case decided before the amendment to rule 58 and

any Rules of Appellate Procedure. Had they been in existence the result probably would have been different.

In Earstling v. Southern Bell Telephone & Telegraph Company, 255 F.2d 93 (5th Cir. 1958), case involves an appeal from what was much more than a minute entry. It "ordered and adjudged that the plaintiff's complaint be and is hereby dismissed. . ." This may very well be a final judgment under the present rule today although it was not at that time found by the Fifth Circuit to be a final order.

Securities & Exchange Commission v. Jean R. Veditz Company, 22 F.R.D. 479 (1958) is a district court decision applying *U. S. v. Shafer,* supra, which of course has been legislatively overruled by Federal Rule of Appellate Procedure 4a(4).

Foman v. Davis, 371 U.S. 178, 83 S. Ct. (1962), a case decided by this court, held that a notice of appeal incorrectly stating the order from which the appeal was taken was effective. That is not the case here and any assertion that the case means more than that is without foundation.

Associated Press v. Taft-Ingalls Corporation, 323 F.2d 114 (6th Cir. 1963) was prior to the amendment to Rule 58 of the Federal Rule of Civil Procedure which required that a judgment be in a separate document. The court said that Rule 58 was of no help and was not applicable to the present case. The circuit court applied the principals of *U. S. v. Shafer,* supra, and upheld an appeal from an order which said:

> "Accordingly, it is ordered that plaintiff recover from the defendant damages in the sum of

> $158,703.43 the amount shown in the amended complaint, with interest from July 26, 1958, together with costs in this action." P. 115.

In determining whether the district judge had intended the judgment to be final under *U. S. v. Shafer,*, supra, the court said:

> "First and most important, the trial judge did sign an enter a formal judgment, on the date of June 28, 1963." This act weighs heavily against the contention that the earlier opinion and entry constituted the final judgment. As the Supreme Court said "Where, as here, a formal judgment is signed by the judge, this is prima facia the decision or judgment rather than a statement in an opinion or a docket entry. . . .The reason for this is 'The judge was conscious as we are, that he was without power to extend the time for appeal. He entered a formal order of record. I am unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time which he could not do overtly.'. . ." P. 116.

Markham v. Holt, 369 F. 2d 940 (5th Cir. 1966) is another case where petitioner's reliance is not well founded. A notice of appeal was filed prior to the entry of the final judgment but after an opinion and an order of the trial court granting a motion for summary judgment was filed. The court basically applied rule 4a(2)of the Rules of Appellate procedure and held that the appeal filed before the judgment was effective but noted in Footnote 5 that this was not a case wherein one of the parties filed a motion to alter or amend the judgment previously entered under Rule 59e, the effect of which would be to suspend the running of the time for appeal and effectively remove the finality of

the original judgment.

U. S. v. Indrelunas, 411 U. S. 216, 36 L. Ed. 2d 202, 93 S. Ct. 1562 (1973) is this court's firm expression that Rule 58 requiring that every judgment be set forth on a separate document applied not only to complex judgments but also to simple judgments. There a jury returned verdicts and the district court's civil docket entry following the recital of these forms of verdict contains the language "entered judgment on the verdicts, jury discharged." The verdicts did not contain any amounts due the plaintiff and that was determined by stipulation at a later date. This court held that the separate document requirement applied to both complex and simple judgments and there was nothing in this case meeting the requirements of the "separate document" provision. Analogously the deputy clerk's minute that the motion for judgment N.O.V. was granted was not a judgment for many reasons.

> "Here there was nothing meeting the requirement of the 'separate document' provision of Rule 58 until February 25, 1971. (When the formal judgment was filed and entered). The docket entry following the jury's verdict simply reflected the jury's determination as to the liability of the parties, without specifying an amount due; more importantly, notwithstanding the instructions of the court, it was not recorded on a separate document."

Sassoon v. U. S., 549 F. 2d 983 (5th Cir. 1977) involved a district judge's reasons for judgment followed by an order. The Fifth Circuit held that it was not a final order because it was not set forth on a separate document, but if there was any doubt, the appeal was too late in any event.

In *Yaretsky v. Blunt*, 529 F. 2d 65 (2nd Cir. 1979) we

have a classic case where an appeal was allowed although it was filed before the entry of judgment, and while there was a Rule 59 motion pending. It would under new Rule 4a(4) be considered a nullity.

Hanson v. Town of Flower Mound, 679 F. 2d 497 (5th Cir. 1982) is another case where the application of Rule 4a(4) was not evoked. The only "judgment or order" was one reciting that this action is dismissed in its entirety with prejudice and no final judgment was ever entered. This was clearly covered by Rule 4a(2) and the Fifth Circuit applied the holding of *Banker's Trust Company v. Maliss*, 435 U.S. 381, 98 S. Ct. 1117, 55 L. Ed.2, 357 (1978) in which this court held that when the order represented the final decision in the case and the appellee did not object to the appeal, the parties should be deemed to have waived the separate-judgment requirement of Rule 58 as pointed out below. Had the appeal been from a "judgment or order" stayed by, among others a Rule 59 motion, the decision would have been controlled by Rule 4a(4) and the appeal would have been a nullity.

Beaudry Motor Company v. Abco Properties, Inc., 780 F. 2d 751 (9th Cir. 1986) is of no help to petitioner. The minute order there said "IT IS ORDERED" and was clearly prepared by the district judge.

Finally, petitioner relies on *Banker's Trust Company v. Mallis*, supra, which provided in a factual situation involving Rule 4a(2) that the separate document requirement of Rule 58 could be waived by the parties. The important distinction between *Banker's Trust* and this case is that in *Banker's Trust* the district court had never subsequently entered any judgment following the apparently defective one from which the party had appealed. Nothing in *Banker's Trust* deals with a situation such as here where

the plaintiff appeals from what he believes to be a judgment, but which is not, and where the district court subsequently files a formal judgment. Would *Banker's Trust* apply to this situation or that in *Acosta*, supra? Clearly, if it did, and the parties were able to waive the separate document requirement of Rule 58, then this court would have so found that it had been done in *Acosta*. But, it is the fact situation in this case and in *Acosta* that is different from *Mallis* and therefore the *Mallis* decision does not apply as it did not to the fact situation in *Acosta*.

Furthermore, as the Court of Appeals said in its per curiam in this case

> "However, the parties cannot waive the separate document rule of Fed. R. Civ. P. 58 if there has been no 'final decision.' and the minute entry of the clerk dated July 14, 1987, did not constitute a 'final decision'."

MOTION TO CORRECT UNDER RULE 60

As mentioined above, petitioner, realizing that his hope for an appeal on the merits were not to be filed a motion in the district court to amend the judgment of October 30 on the grounds that a party to the suit was not mentioned therein. It is obvious, and he has conceded in argument that he hopes to have the judgment of October 30 declared a nullity and have a new judgment so he has thirty days to appeal from that. He says that the judgment of October 30 was not final because the court did not dispose of the plaintiff's claim against one party. The district court held that no correction of the judgment was necessary because the claim which petitioner had against that defendant was abandoned by him in the district court.

The Court of Appeals in a per curiam dated March 7, 1989, (Appendix "E") agreed.

Plaintiff then appealed to the Fifth Circuit Court of Appeals and his appeal is pending there. Briefs have been written but no date for argument has been set, if any is going to be set.

It will be premature for this court to consider any contention by petitioner that the judgment of October 30, 1987 was not a final judgment because it did not meet with Rule 54b requirements.

CONCLUSION

Accordingly, this court should deny the Petition for Writ of Certiorari applied for by the petitioner.

Respectfully Submitted

RENE' A. PASTOREK
Bar Number: 10410
2550 Belle Chasse Hwy.
Suite 130
Gretna, LA 70053
P. O. Box 1478
Gretna, LA 70054-1478
Telephone: (504) 368-9883

CERTIFICATE OF SERVICE

I do hereby certify that I have on the 14th day of September, 1989, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed, and first class postage prepaid.

RENE' A. PASTOREK

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
APR 9 1987

EDWARD G. JONES — CIVIL ACTION

VERSUS — NO. 85-491

THE CELOTEX CORPORATION, ET AL — SECTION "C"(5)

* * * * * * * * * * * * * * * * * *

J U D G M E N T

The jury having duly rendered its verdict, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Edward G. Jones, and against The Celotex Corporation and Aetna Casualty and Surety Company, in the amount of $670,000.00 with interest at the legal rate from date of judicial demand and costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Salvage One Demolition Co., be hereby dismissed with prejudice for failure to prosecute.

New Orleans, Louisiana, this 8th day of April, 1987.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

Approved as to form:
/s/ Robert Collins
UNITED STATES DISTRICT JUDGE

Date of Entry APR 9, 1987

APPENDIX B

DOCKET ENTRY

Plaintiffs	Defendants

85-491

EDWARD G. JONES — THE CELOTEX CORPORATION, A WHOLLY OWNED SUBSIDIARY OF THE JIM WALTER CORPORATION, AND

INTERVENOR- 7/8/85:
LIBERTY MUTUAL INSURANCE COMPANY — AETNA CASUALTY AND SURETY COMPANY

PAUPER CASE

3rd PTY COMPLT 7-2-85
DISM SCOTTSDALE INS. CO. 9-26-86
DISM LIBERTY MUTUAL INS. CO. 9-26-86
SALVAGE ONE DEMOLITION CO.

3rd pty complt-Celotex/Aetna-4-
NATIONWIDE MUTUAL INSURANCE COMP.
NATIONWIDE MUTUAL FIRE INS. CO.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1332 - Other Personal Injury-Structure on which plaintiff was standing collapse causing plaintiff to fall approximately 2½ stories to the ground.

ATTORNEYS

FORD T. HARDY, JR. ESQ.
416 Gravier St.
NOLA 70130-2499
561-0541

WINDHORST, PASTOREK & GAUDRY
Rene A. Pastorek, T.A.
2304 Manhattan Blvd.
Harvey, LA 70058
P. O Box 409
Gretna, LA 70058 362-2466
FOR: DEFTS

BORRELLO, HUBER & DUBUCLET
Kathleen W. Will
3501 N. Causeway Blvd, Suite 220
P. C. Box 6798
Metairie, LA 70009
837-7050
For: Liberty Mutual Insurance Co.

BIENVENU, FOSTER, RYAN & O'BANNON
Ernest L. O'Bannon, T.A.
John C. Tollefson
1400 American Bank Bldg.
NOLA 70130 581-2146
For: SCOTTSDALE INS. CO.

PORTEOUS, HAINKEL, JOHNSON & SARPY

JULY 8, 1987

85-491

EDWARD G. JONES VS. THE CELOTEX CORPORATION, ET AL

MOTION OF CELOTEX CORPORATION AND AETNA CASUALTY & SURETY CO. FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR NEW TRIAL.

ARGUED. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT GRANTED.

APPEARANCES: Ford Hardy-Plaintiff
Rene Pastorek-Defendants

Courtroom Deputy-Pam Polk
Court Reporter-Pat Duroncelet
DATE OF ENTRY JUL 14 1987

APPENDIX C

DOCKET ENTRY

Plaintiffs	Defendants

85-491

EDWARD G. JONES	THE CELOTEX CORPORATION, A WHOLLY OWNED SUBSIDIARY OF THE JIM WALTER CORPORATION, AND
INTERVENOR- 7/8/85: LIBERTY MUTUAL INSURANCE COMPANY	AETNA CASUALTY AND SURETY COMPANY

PAUPER CASE

3rd PTY COMPLT 7-2-85
DISM SCOTTSDALE INS. CO. 9-26-86
DISM LIBERTY MUTUAL INS. CO. 9-26-86
SALVAGE ONE DEMOLITION CO.

3rd pty complt-Celotex/Aetna-4-
NATIONWIDE MUTUAL INSURANCE COMP.
NATIONWIDE MUTUAL FIRE INS. CO.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

28 USC 1332 - Other Personal Injury-Structure on which plaintiff was standing collapse causing plaintiff to fall approximately 2½ stories to the ground.

ATTORNEYS

FORD T. HARDY, JR. ESQ.
416 Gravier St.
NOLA 70130-2499
561-0541

WINDHORST, PASTOREK & GAUDRY
Rene A. Pastorek, T.A.
2304 Manhattan Blvd.
Harvey, LA 70058
P. O Box 409
Gretna, LA 70058 362-2466
FOR: DEFTS

BORRELLO, HUBER & DUBUCLET
Kathleen W. Will
3501 N. Causeway Blvd, Suite 220
P. O. Box 6798
Metairie, LA 70009
837-7050
For: Liberty Mutual Insurance Co.

BIENVENU, FOSTER, RYAN & O'BANNON
Ernest L. O'Bannon, T.A.
John C. Tollefson
1400 American Bank Bldg.
NOLA 70130 581-2146
For: SCOTTSDALE INS. CO.

PORTEOUS, HAINKEL, JOHNSON & SARPY
Glenn B. Adams, Esq.
704 Carondelet Street
New Orleans, LA 70130
(504) 581-3838
For: Nationwide Mutual Ins. Co.
Nationwide Mutual Fire, Ins.

8-5-87

DATE	NR.	PROCEEDING 85-491 C
2/1/85	1	Pltf's mtn & order allowing same to proceed in forma pauperis (RFC) dktd 2/8/85.
4-24-85	2	ANSWER of Celotex Corp & Aetna Casualty & Surety Co. to pltf's complt.
5-3-85	3	PREL CONF NTC set for 5-16-85 @4:15pm by tele. dktd 5-6-85.
5/16/85	4	M.E. 5/16/85. Prel Conf. held. Amendments w/in 30 days. Final PTC set 11/7/85 at 9:30 am before Judge. TRIAL set 11/25/85 at 9 am before Judge. (RFC) Dktd 5/20/85
6-26-85	5	Celotex Corp & Aetna Casualty & Surety Co.'s mtn & ORDERED that 3rd pty complt agst Salvage One Demolition, Inc. & Liberty Mutual Ins. Co. & Ins. Co. is permitted to be filed. (RFC) 7-1-85 dktd 7-2-85.
7-2-85	6	Celotex Corp & Aetna Casualty & Surety Co's 3rd pty complt agst Salvage One Demolition Co., Inc., Liberty Mutual Ins. Co., & Scottsdale Ins. Co. 3 TPC issd.
7-3-85	7	MTN & ORDER of Liberty Mutual Insurance granting lv to file petition of intervention (RFC) 7-8-85 DKTD 7-8-85.
7-8-85	8	Petition of Intervention of Liberty Mutual Insurance Company, 3 summ issd.
7-26-85	9	The Celotex Corp's ntc & acknowledgment of receipt of S&C svd 7-17-85.
8-15-85	10	ANSWER of defts' to intervention complt.
8-9-85	9a	Liberty Mutual Ins.'s mtn & ORDERED that extension of time is EXTENDED until 9-4-85 to answer. (RFC) 8-14-85 dktd 8-16-85.
8-15-85	11	ANSWER of pltf to pet of intervention of Liberty Mutual Ins. Co.
8-29-85	12	Celotex & Aetna's ntc of depo. of Felton Coleman 9-5-85.
8-29-85	13	Celotex & Aetna's ntc of depo of Eddie Landix 9-5-85.
8-29-85	14	Celotex & Aetna's req & Issd 2 subpa.
8-30-85	15	Rtn on subp to Felton Coleman & Eddie Landix avd 8-29-85.
9-11-85	16	Pltf's witness list.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE 2

DATE	NR.	PROCEEDINGS
9-16-85	17	Pltf's mtn & ORDERED that 1st supplemental & amending complt is filed. (RFC) 9-16-85 dktd 9-16-85.
10-16-85	18	Joint Mtn. & ORDER that TRIAL is CONTD to be RESET. (RFC) 10-15-85.
11-6-85	19	Ntc of conf set for 11-21-85 @3:15pm before Judge Collins. dktd 11-12-85.
11-26-85	20	M.E. 11-25-85: Following dates will govern deposition of case: Mtns by 4-23-86 all disc by 4-4-86, pre trial order by 5-14-86 @5pm, PRE TRIAL CONF set for 5-16-86 @ TRIAL set for 6-16-86 @9am, written reports of experts 15 days prior to pre trial conf, all witness list 30 days prior to pre trial conf. (RFC) dktd 12-2-85.
1-23-86	21	ANSWER of Scottsdale Ins. Co. to 3rd pty complt of Celotex Corp. & Aetna.
3-24-86	22	NTc of depo by Scottsdale Ins. of Celotex Corp. 3-31-86.
3-24-86	23	Req of Scottsdale & issd 1 subp.
3-26-86	24	Ntc of depo by Scottsdale of Maurice Patterson 4-11-86.
3-27-86	25	Witness list of Scottsdale.
4-2-86	26	Mtn of Celotex & Aetna & ORDERED that 3rd pty agst Nationwide Mutual is permitted filed. (RFC) 4-2-86 dktd 4-3-86.
4-2-86	27	3rd pty complt of Celotex Corp. & Aetna agst Nationside Mutual Ins. Co. & Nati wide Mutual Fire Inc. Co. 2 sms isd.
4-3-86	28	Req of Celotex & reised 1 sms.
4-2-86	26a	JOINT mtn & ORDERED that expedited hrg on mtn to cont set for 4-8-86 in chamber (RFC) 4-8-86 dktd 4-9-86.
4-9-86	29	JOINT mtn & ORDERED that TRIAL set for 6-17-86 CONT'D to be: reset by courtrc deputy. (RFC) 4-8-86 dktd 4-9-86.
4-18-86	30	M.R. On S&c to nationwide Mutual exec 4-16-86.
4-17-86	29A	Ntc that conf set 5-12-86 at 3:45 p.,. bfr Judge.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE ___

DATE	NR.	PROCEEDINGS
4-30-86	31	M.R. on 3 pty summs to Salvage One Demolition Co by Mail; retd unsvd.
5-5-86	32	Req by Celotex Corp for re-issuance of 3rd pty summs, 1 issd.
5-21-86	33	RECTC of conf set ofr 6-5-86@2:45pm before Judge Collins.
5-28-86	34	M.R. on 3rd pty S&C to Nationwide Mutual Fire Insurance Co. svd 5-27-86.
5-29-86	35	M.R. on 3rd S&C to Salvage One Demolition Co. ret unsvd 5-29-86.
6-5-86	36	Pltf's mtn & ORDERED that 2nd suppl & amend complt permitted to be filed. (RFC) 6-5-86 dktd 6-6-86.
6-6-86	37	Pltf's 2nd suppl & amend complt adding Nationwide Mutual Ins. Co. & Scottsdale Ins. Co. 4 sms issd.
6-9-86	38	M.E. 6-6-86: TRIAL set ofr 6-16-86 CONT'D. Mtns by 10-22-86, all disc by 10-3-86 PTO by 10-29-86 @5pm, PTC set for 10-31-86 @9:30am, TRIAL set for 11-17-86 @9am written reports of experts 15 days prior to PTC. all witnesses list 30 days prior PTC. (RFC) dktd 6-10-86.
6-12-86	39	ANSWER of Nationwide Ins & Nationwide Mutual Fire to 3rd pty complt of Celotex Corpt. & Aetna.
6-12-86	40	ANSWER of Nationwide Mutual Ins & Nationwide Mutual Fire to pltf's 2nd suppl amending complt.
9-2-86	41	Mtn of Scottsdale Ins Co. for sum judg; hrg set 9-24-86 at 9:00am.
9-12-86	42	ANSWER of Celotex Corp and AETNA Casualty & Surety Co. to pltf's 2nd suppl and amending Complt.
9-26-86	43	M.E. 9-24-86: Mtn of Scottsdale Ins Co for summ judg - 3rd pty complt & 2nd suppl & amending petition are DISMISSED insofar as they relate to Scottsdale Ins Co. (RFC) dktd 9-26-86.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE ___

DATE	NR.	PROCEEDINGS
9-26-86	44	Mtn of Celotex Corp & Aetna Casualty & Order that their 3rd pty complt agst Liberty Mutual Ins. Co. is DISMISSED w/o prej. (RFC) 9-26-86 dktd 9-29-86.
9-30-86	45	Witness list of Celotex Corp & Aetna Casualty & Surety.
10-1-86	46	Pltf's witness list.
10-1-86	47	Witness list of Liberty Mutual Insurance Company, Intervenor.
10-2-86	48	Witness list by National Mutual Ins. Co.
10-15-86	49	Pltf's amend witness list.
10-24-86	50	Pltf's req for subps; 25 issd.
11-3-86	51	PTO-PTC held 10-31-86 at 9:30am; JURY TRIAL set 11-17-86 at 9am (RFC) 10-31-86 dktd 11-3-86.
11-3-86	52	Req by defts for subp. Issd (3).
11-7-86	53	Request of Celotex Corp for subps; 1 issd.
11-7-86	54	Mtn of Celotex Corp & Aetna Casualty in Limine. Hrg date to be assigned by the Judge.
11-7-86	55	Request of Celotex Corp for subps; 1 issd.
11-7-86	56	Pet on subp to Edward G Jones, Roy Hebert Admas, svd 11-4-86.
11-10-86	57	Return of subp to Marion Edwards, svd 11-10-86.
11-12-86	58	Return of subp to Roxy Strickland svd 11-10-86.
11-12-86	59	Request of Celotex Corp & Aetna Casualty Co ofr subps: 1 issd.
11-12-86	60	Ret on Subp to Harold M. Stokes, M.D. svd 11-22-86.
11-14-86	61	Pltf's mtn & ORDER that mtn in limine by heard in chambers prior to trial on the merits (RFC) 11-13-86 dktd 11-17-86.
11-18-86	62	M.E. 11-17-86; Trial previously set 11-17-86 is continued. PTC set 3-26-87 at 9:30 am bfr Judge. JURY TRIAL set 3-30-86 at 9:00 am bfr Judge. (RFC) 11-18-86.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE ___

DATE	NR.	PROCEEDINGS
	X	Letter from John C. Tollefson to Court dated 11-24-86 requesting that their name be removed from mailing list since their client has already been dismissed from this case.
2-24-86	63	Pltf's request for subp; 20 issd.
3-18-86	64	Return of subps ro Marion Edwards, Harold M. Stokes, M.D. Edward G. Jones, Sterling Adams, & Eddie Landix, svd 3-16-87.
3-23-87	65	Request by Liberty Mutual Ins. Co. for subps; 2 issd.
3-23-87	66	Amended witness list of Nationwide Mutual Insurance Company.
3-25-67	67	Memo by Celotex Corp and Aetna Casualty & Surety Co in opp ro pltf's mtn in limine.
3-26-87	68	Pltf's memo in opp to Celotex mtn in limine re: strict liability.
3-27-87	69	PRE-TRIAL ORDER: PTC held 3-26-87: JURY TRIAL set 3-30-87 at 10:00 am bfr Judge (RFC) 3-26-87 dktd 3-27-87.
3-30-87	70	JURY TRIAL: Case called; all present & Ready; jointly stipulated and according ordered that Nationwide Mutual Insurance Company & Nationwide Mutual Fire Insurance Company are DISMISSED as ptys to this lawsuit; jury sworn; opening statements made; witnesses testify; court recesses until 10:00 am on 3-31-87. (RFC) dktd 3-31-87.
3-31-87	71	JURY TRIAL CON'T FROM 3-30-87: Witnesses testify; court recesses until 4-1-87 at 10:00 am bfr Judge. (RFC) dktd 4-1-87.
4-1-87	72	JURY TRIAL CON'T FROM 3-31-87: Deft offers proffers #1,2,&3 regarding the criminal record of pltf; witness testifies; court recesses until 4-2-87 at 10:00 a.m. (RFC) dktd 4-3-87.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE ___

DATE	NR.	PROCEEDINGS
4-2-87	73	JURY TRIAL CON'T FROM 4-1-87: Charge objections placed on record; witnesses testify; deft moves for directed verdict - court takes matter under advisement & ORDERS that case proceed to jury; both ptys move for directed verdict - court takes mmtns under advisement; charges jury; jury returns verdict; jury to return to deliberation room to complete question #2; jury returns verdict; verdict read; jury polled; Mag Chasez orders that verdict of jury be filed; (RFC) dktd 4-6-87.
4-6-87	74	Joint mtn & ORDER that claims as agst Nationwide Mutual Ins. Co & Southern Stat Steel Erection Co are dismissed w/o prej, each pty to bear its own costs. (RFC) 4-1-87 dktd 4-6-87.
4-6-87	75	Pltf's requested jury charges.
4-6-87	76	Requested jury charges by Aetna Casualty & Celotex Corp.
4-9-87	77	JUDGMENT: ORDERED in favor of Edward G. Jones agst Celotex Corp & Aetna for $670,000.00 w/interest. FURTHER ORDERED that Salvage One Demolition Co is DISMISSED w/prej for failure to presecute. (CLERK - approved RFC) dktd 4-9-87.
4-14-87	78	Jury instructions.
4-16-87	79	Mtn by Celotex & Aetna Casualty & ORDER that exec of Judg entered 4-9-87 is stayed until the deft's Post-Trial Mtn for Judg NOV & New Trial is disposed of. (RFC) DKTD 4-17-87.
-23-87	80	Mtn of Celotex Corp & Aetna Casualty for judg notwithstanding the verdict or in the alternative for new trial. hrg set for 5-20-87 9:00am bfr Judge.
4-27-87	81	Pltf's unopposed mtn & ORDER that hrg on mtn for judg not withstanding the verdict is CONT from 5-20-87 to 6-3-87 at 9 am Judge. (RFC) 4-28-87. dktd 4-29-87.
	xx	Letter from Glen Adams dtd 5-1-87 req to be taken off mailing list.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE ___

DATE	NR.	PROCEEDINGS
5-26-87	82	Pltf's memo in opp to deft's mtn for judg notwithstanding the verdict or, in the alternative, for new trial.
5-29-87	83	Mtn by Cleotex Corp & Aetna Casualty & ORDER granting leave to file reply memo. (RFC) 6-1-87 dktd 6-2-87.
6-1-87	84	Reply memo by Celotex Corp. & Aetna Casualty.
6-4-87	85	M.E. 6-2-87: ORDERED that mtn of defts' for judg notwithstanding the verdict previously set for 6-3-87 is CONT to 7-8-87 9:00am. (RFC) dktd 6-5-87.
7-2-87	86	Pltf's mtn & ORDER granting leave to file suppl memo. (RFC) dktd 7-10-87.
7-7-87	87	Pltf's suppl memo in opp to deft's mtn for judg notwithstanding the verdict or, in the alternative, for new trial.
7-8-87	88	Hrg on mtn by Celotex Corp & Aetna for judg notwithstanding the verdict or in the alternative for new trial - mtn for judg notwithstanding verdict GRANTED. (RFC) dktd 7-14-87.
7-16-87	89	Pltf's ntc of appeal from amended judg entered 7-14-87.
7-17-87	xx	Notice of Appeal forwarded to all parties. (dlm)
7-30-87	90	NTC OF APPEAL by Liberty Mutual from amended judg entered on 7-14-87.
7-31-87	xx	Notice of Appeal forwarded to all parties. (dlm)
8-4-87	91	Pltf's request for transcript of proceedings held 3-30-87, 3-31-87, 4-1-87 and 4-2-87 of jury trial and hrg on mtn for judg N.O.V. held 7-87.
7-28-87	89a	Pltf's mtn & ORDER granting a pauper appeal, thereby further ordering that the trranscript of all testimony in this matter be prepared and forwarded to the 5th Circuit Court of Appeals at govt expense, as the appeal is not frivioulous & presents a substantial question. (RFC) 8-6-87 dktd 8-10-87.

PLAINTIFF
EDWARD G. JONES

DEFANDANT
THE CELOTEX CORP., ET AL
DOCKET NO 85-491
PAGE ___

DATE	NR.	PROCEEDINGS
4-27-87	81a	Pltf's mtn to amend stay order & UNSIGNED ORDER.
1021-87	92	Letter to Clerk from 5th Circuit req that court reported discount her invoice 10% due to tardiness of proving transcript.
10-30-87	93	M.E. 10-29-87: ORDER & REASONS: ORDERED that mtn of Cleotex Corp. & Aetna Casual for judg notwithstanding the verdict of for new trial is GRANTED & further that judg entered on 4-9-87 is RECALLED, VACATED & SET ASIDE. (RFC) dktd 10-30-87.
10-30-87	94	JUDGMENT: ORDERED in favor of Celotex Corp & Aetna Casualty & agst pltf dismiss pltf's complt w/prej, each pty to bear own costs; Further that Salvage One Demolition Co. be dismissed w/prej, for failure to prosecute. (CLERK - approved RFC) dktd 11-2-87.
11-4-87	95	Transcript of trial held on 3-30-87 w/Judge. (VOL. I)
11-4-87	96	Transcript of trial held on 3-31-87 w/Judge. (VOL. II)
11-4-87	97	Transcript of trial held on 4-1-87 w/Judge. (VOL. III)
11-4-98	98	Transcript of trial held on 4-2-87 w/Judge. (VOL. IV)
11-6-87	XX	Record forwarded to Ct of Appeals. (JMD)

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
OCT 30 1987

EDWARD G. JONES — CIVIL ACTION

VERSUS — NO. 85-0491

THE CELOTEX CORPORATION, ET AL — SECTION "C"(5)

* * * * * * * * * * * * * * * * * *

J U D G M E N T

The Court having granted defendant's motion for judgment notwithstanding the verdict, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Cleotex Corporation, and Aetna Casualty and Surety Company, and against plaintiff, Edward G. Jones, dismissing the complaint with prejudice, with each party bearing their own costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Salvage One Demolition Co., be dismissed with prejudice for failure to prosecute.

New Orleans, Louisiana, this 30th day of October, 1987.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

Approved as to form:
/s/ Robert Collins
UNITED STATES DISTRICT JUDGE

Date of Entry NOV 2 1987

APPENDIX E

JONES v. CELOTEX CORP.

Edward G. JONES, Plaintiff-Appellant,
and
Liberty Mutual Insurance Company,
Intervenor-Appellant,

v.

The CELOTEX CORPORATION, A Wholely Owned SUBSIDIARY OF the JIM WALTER CORPORATION, and Aetna Casualty and Surety Company, Defendants-Appellees.

No. 87-3515

United States Court of Appeals,
Fifth Circuit

Oct. 14, 1988.

After a jury before the United States District Court for the Eastern District of Louisiana, 683 F.Supp. 555, Robert F. Collins, J., found for negligence plaintiff, the District Court granted the defendnat's motion for judgment notwithstanding the verdict. On appeal, the Court of Appeals held that plaintiff's filing of notice of appeal after oral decision and entry of minute order by clerk but prior to entry of final decision of the District Court was ineffective.

Dismissed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

Edward G. Jones attempts to appeal the judgment notwithstanding the verdict granted by the district court. Because no notice of appeal was filed after judgment was entered this court is without jurisdiction.

I.

Appellee Celotex Corporation is the owner and operator of a manufacturing plant located in Louisiana. Appellant Jones was an employee of Salvage One Demolition Co. a/k/a Southern States Demolition Co. ("Salvage One"). Salvage One contracted with Celotex to demolish certain buildings at the plant. During the demolition of one of the buildings, Jones was injured when the part of the structure on which he was working collapsed. At trial, appellant attempted to show that Celotex controlled the method and means by which Salvage One performed its job. Celotex, on the other hand, produced evidence to prove that Salvage One carried out is function as an independant contractor and made all material decisions as to how the buildings would be demolished. The jury found Celotex to be negligent and awarded damages of $670,000 to Jones. The district court adopted the verdict of the jury and entered judgment on April 9, 1987.

Celotex moved for a judgment notwithstanding the verdict or in the alternative for a new trial. The district court held a hearing on the motion on July 8, 1987. At the hearing, the district court orally granted the motion for judgment notwithstanding the verdict and advised that he would provide his written opinion later. On that same date, the district court clerk made the following minute entry about the hearing: "Motion of Celotex Corporation and Aetna Casualty & Surety Co. for Judgment Notwithstanding the Verdict or in the Alternative for New Trial. Argued. Motion for Judgment Notwithstanding Verdict

Granted." The clerk entered this minute entry on the docket on July 14, 1988 with the following notation: "Hrg on mtn by Celotex Corp. & Aetna for judg notwithstanding the verdict or in the alternative for new trial—mtn for judg notwithstanding verdict GRANTED." On July 16, 1987, Jones filed a notice of appeal "from the Amended Judgment entered in this action on the 14th day of July, 1987."

On October 30, 1987 the district court issued a written opinion granting the motion for judgment notwithstanding the verdict. 683 F.Supp. 555. On that same date, the clerk prepared and signed a separate dicument entitled "Judgment." This document was approved as to form by the district court, and entered on the docket on November 2, 1987. Jones did not file a new notice of appeal after judgment was entered.

II.

We raise the question of our own jurisdiction *sua sponte*. Under 28 U.S.C. § 1291, "[t]he courts of appeals ... have jurisdiction of appeals from all final decisions of the district courts of the United States." Federal Rule of Appellate Procedure 4(a)(4) prescribes the timing for an appeal from a judgment notwithstanding the verdict:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by a party: (i) for judgment under Rule 50(b); ... the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any such other motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

[1,2] The time within which a notice of appeal must be filed begins to run on the date of entry of a judgment. A judgment is not entered within the meaning of Fed.R.App.P. 4(a)(4) unless it is entered in compliance with Federal Rules of Civil Procedure 58 and 79(a). Fed.R.App.P. 4(a)(6). Rule 58 requires that every judgment be set forth in a separate document,[1] and Rule 79(a) requires the district court clerk to enter the judgment in the docket.[2] In this case, no separate judgment was set forth as required by Fed.R.Civ.P. 58 until October 30, and no entry was made in accordance with Fed.R.Civ.P. 79(a) until November 2. A notice of appeal is ineffective unless filed after entry of judgment on a motion for judgment notwithstanding the verdict. Fed.R.App.P. 4(a)(4); *Acosta v. Louisiana Dep't of Health and Human Resources,* 478 U.S. 251, 106 S.Ct. 2876, 92 L.Ed.2d 192 (1986).

[3,4] We have held that we may take jurisdiction of

---

[1] Federal Rules of Civil Procedure 58 provides in part:

> [U]pon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court. . . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

[2] Federal Rules of Civil Procedure 79(a) provides in part:

> The clerk ... shall enter [in the civil docket] each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers.... All papers filed with the clerk, ... all appearances, orders, verdicts, and judgments shall be entered chronoloically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court. . . . The entry of an order or judgment shall show the date the entry is made.

an appeal from a "final decision" under § 1291, even though no separate judgment has been entered, when the parties fail to raise the issue. *Hanson v. Town of Flower Mound*, 679 F.2d 497 (5th Cir.1982). However, the parties cannot waive the separate document rule of Fed.R.Civ.P. 58 if there has been no "final decision." The minute entry of the clerk dated July 14, 1987, did not constitute a "final decision." this court succinctly stated the law in *Pure Oil Co. v. Boyne*, 370 F.2d 121 (5th Cir. 1966):

> The only act on the part of the court was oral, and the only written evidence of such action was the minute entry of the clerk. Even prior to the added requirement of Rule 58, this minute entry alone could not stand as a final judgment of the district court. "Courts render judgment; clerks only enter them on court records."

Id. at 123 (quoting *Burke v. Comm'r of Internal Revenue*, 301 F.2d 903 (1st Cir. 1962). *See also Wood v. Coast Frame Supply, Inc.*, 779 F.2d 1441 (9th Cir.), *amended* 791 F.2d 802 (1986).

III

Final judgment was not entered in this case until November 2, 1987. Since no appeal was filed after that date, we lack jurisdiction. Accordingly, the appeal is

DISMISSED.

APPENDIX F

JONES v. CELOTEX CORP.

Edward G. JONES, Plaintiff-Appellant,

and

Liberty Mutual Insurance Company, Intervenor-Appellant,

v.

The CELOTEX CORPORATION, A Wholly Owned SUBSIDIARY OF THE JIM WALTER CORPORATION, and Aetna Casualty and Surety Company, Defendants-Appellees.

No. 87-3515

United States Court of Appeals,
Fifth Circuit.
March 7, 1989.

Demolition company's employee filed suit, seeking damages for injuries he sustained in demolishing a manufacturing plant. the plant owner and its insurer moved for judgment notwithstanding the jury's verdict in favor of the employee. The United States District Court for the Eastern District of Louisiana, Robert F. Collins, J., 683 F.Supp. 555, granted the motion. Appeal was taken. The Court of Appeals, 857 F.2d 273, dismissed. On a petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held that employee's motion for correction of the original judgment, which had not mentioned one defendant, did not make the original judgment anything

other than a final, appealable judgment.

Petition for rehearing denied.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 14, 5th Cir., 1988, 857 F.2d 273)

Before CLARK, Chief Judge, GARZA and POLITZ, Circuit Judges.

PER CURIAM:

Following publication of our original opinion in this case, we granted Jones' motion for leave to secure correction of Judgment in the district court. In the district court Jones sought to have the October 30, 1987 judgment corrected on the grounds that it did not mention one of the defendants in the case, William Walker.

[1,2] The subsequent action by the district court does not render the October 30, 1987 judgment non-final. An order that effectively ends the litigation on the merits is an appealable final judgment even if the district court does not formally include judgment on a claim that has been abandoned. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n.*, 805 F.2d 663, 667 (7th Cir.1986). *cert. denied*, 480 U.S. 941, 107 S.Ct. 1593, 94 L.Ed.2d 782

(1987). Since there was no notice of appeal following the October 30, 1987 final judgment, our opinion properly dismissed the case for lack of jurisdiction.

We note that the dismissal does not result in inequity to Jones. The facts in the record plainly support the judgment not-withstanding the verdict. Absent the jurisdictional defect, the judgment surely would have been affirmed.

In all other respects, the petition for rehearing is denied and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.